(17)

No. 94-590-CFX
Status: GRANTED

Title: Vernonia School District 47J, Petitioner
v.
Wayne Acton, et ux., etc.

Docketed:
September 30, 1994

Court: United States Court of Appeals for
the Ninth Circuit

Counsel for petitioner: Volpert,Timothy R.

Counsel for respondent: Christ,Thomas M.

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1994	G	Petition for writ of certiorari filed.
3	Oct 31 1994	X	Brief of respondents Wayne Acton, et ux. in opposition filed.
2	Nov 2 1994		DISTRIBUTED. November 23, 1994 (Page 3)
4	Nov 18 1994	X	Reply brief of petitioner filed.
5	Nov 28 1994		Petition GRANTED.
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6	Jan 12 1995		Joint appendix filed.
7	Jan 12 1995		Brief of petitioner Veronia School District 47J filed.
8	Jan 12 1995		Brief amicus curiae of United States filed.
9	Jan 12 1995		Brief amicus curiae of National School Boards Association filed.
10	Jan 12 1995		Brief amicus curiae of American Alliance for Rights & Responsibilities filed.
11	Jan 12 1995		Brief amicus curiae of Criminal Justice Legal Foundation filed.
12	Jan 12 1995		Brief amici curiae of National League of Cities, et al. filed.
13	Jan 12 1995		Brief amicus curiae of California Interscholastic Federation filed.
14	Jan 12 1995		Brief amicus curiae of Institute for Drug-Free Workplace filed.
15	Jan 12 1995		Brief amicus curiae of Paradise Valley Unified School District No. 69 filed.
16	Jan 12 1995		Brief amici curiae of Washington Legal Foundation, et al. filed.
17	Jan 12 1995		LODGING consisting of ten sets of two documents submitted by counsel for amici Washington Legal Foundation, et al.
19	Jan 27 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Jan 30 1995		SET FOR ARGUMENT TUESDAY, MARCH 28, 1995. (1ND CASE).
20	Feb 2 1995		CIRCULATED.
21	Feb 13 1995		Record filed.
		*	Original record proceedings United States District Court for the District of Oregon.
23	Feb 16 1995		Brief of respondents Wayne Acton, et ux. filed.
22	Feb 21 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Feb 21 1995		Record filed.

2 pp

No. 94-590-CFX

Entry	Date	Note	Proceedings and Orders
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
25	Mar 20 1995	X	Reply brief of petitioner filed.
26	Mar 28 1995		ARGUED.

Supreme Court, U.S.
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94 590 SEP 30 1994

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Vernonia School District 47J's program of random drug testing of middle and high school student athletes in the absence of individualized suspicion is a constitutionally reasonable "search" under the Fourth Amendment to the United States Constitution?

STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Vernonia School District 47J, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, *infra*) is reported at 23 F.3d 1514 (9th Cir. 1994). The opinion of the United States District Court (Pet. App. B, *infra*) is reported at 796 F. Supp. 1354 (D. Or. 1992).

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit were filed on May 5, 1994 (Pet. App. A). Petitioner's timely petition for rehearing was denied by that

court by order of July 8, 1994 (Pet. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner, Vernonia School District 47J (hereinafter "the District"), established a policy allowing it to conduct urinalysis drug testing of its middle and high school student athletes to protect those students from physical injury and to counteract an epidemic of drug use and disciplinary problems involving student athletes and other students in the District.

Respondents Wayne and Judy Acton, as guardians ad litem for James Acton, a 12-year old student in the 7th grade of Washington Grade School in Vernonia Oregon, objected to the District's drug-testing program and, represented by the ACLU, filed an action under 42 U.S.C. 1983 and 1988 seeking a judicial declaration that the drug-testing policy vio-

lates guarantees in the federal and state constitutions against unreasonable searches. Respondents also sought an injunction against enforcement of the policy.

Facts Relevant to the Petition.[1]

Vernonia, Oregon is a small logging community of approximately 3000. The community has a central interest in school district activities in general and in athletics in particular. 796 F. Supp. at 1356 (Pet. App. B at 76a). A significant majority of Vernonia high school and elementary school students participate in District sponsored athletics. *Id.*,

[1] The Ninth Circuit found no clear error in the district court's findings of fact. 23 F.3d at 1519 (Pet. App. A at 20a). The facts stated herein are therefore largely taken from the district court's findings. On occasion, petitioner will cite to facts recited by the Ninth Circuit.

(Pet. App. B at 77a.)[2]

Although discipline and drug use had not previously been a significant problem in the Vernonia schools, beginning in the mid-to-late 1980s, the teaching staff began noticing "a startling and progressive increase in students' use of drugs and alcohol." *Id.*, (Pet. App. B at 78a.) The administration investigated the source and attempted to address this increasing problem through education. 796 F. Supp. at 1357 (Pet. App. B at 82a-84a).[3] Yet, as time passed, the glamor-

[2] Interscholastic athletics play a dominant role in the Vernonia community and student athletes are well known and admired. Approximately 60-65% of the high school students and 75% of the elementary school students participate in District sponsored athletics. *Id.*, (Pet. App. B at 76a-77a.)

[3] Initially, the Vernonia High School principal met with the teaching staff and asked them to gauge the magnitude of the drug and alcohol problem and to determine what responsive steps should be taken. The school administration first attempted to deter drug and alcohol use through education. Special classes were held on the effect and addictive nature of drugs. The school

ization and use of drugs and alcohol became more blatant. Students boasted about drug use. Drug paraphernalia was confiscated on school grounds, and open use of drugs was observed at a local cafe across the street from the high school. Class decorum suffered. Outbursts of profane language during class, rude and obscene statements directed at other students and "a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol" typified a usual day. 796 F. Supp. at 1356-57 (Pet. App. B at 79a-80a). There was an almost three-fold

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administration invited well-known speakers to address the students, hoping the speakers could reach the students. Seminars within classes, polls, and theatrical presentations were all tested but failed to achieve any significant impact on the disruptive atmosphere. The day after the presentation of a play directed at the problems caused by drug use, several sophomore athletes were caught cutting classes to hold a party where arrests took place for the use of intoxicants. *Id.*

increase in classroom disruptions and disciplinary reports between 1986 and 1989.[4]

Drug and alcohol use invaded the sports program. 796 F. Supp. at 1357 (Pet. App. B at 80a). In fact, the administration determined that the leading student athletes were also the leaders of the drug activity, thus endangering "the very center of activity of the school and the community." *Id.*, (Pet. App. B at 82a-83a). Students consumed alcohol in a bus after a game. Others stole alcohol from a store after a track meet. At

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[4] Vernonia teachers felt upset and helpless as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. One teacher, who had never experienced classroom discipline problems in the past, was ready to give up 15 years of service because of her frustration in dealing with this new situation. Organizations formed within the student drug culture, taking such names as the "Big Elk" or the "Drug Cartel." Loud "bugling" or "head butting" became the symbols for these groups. 796 F. Supp. at 1356 (Pet. App. B at 79a-80a).

least one of the student organizations which formed within the drug culture--the Big Elk--was composed largely of athletes. Athletes turned in classroom assignments which bragged about drug use. 23 F.3d at 1516 (Pet. App. A at 3a-4a).

Ron Svenson, a teacher and coach, testified that suspected drug use contributed to the serious injury of a wrestler who failed to execute a basic maneuver. Likewise, the football coach gave "convincing testimony" that drug use affected certain football players who ignored or forgot well-drilled safety routines. 796 F. Supp. at 1357 (Pet. App. B at 81a). Parents reported that they had heard of drug use on a football trip and, when confronted by the principal, students admitted that they had used marijuana. 23 F.3d at 1516 (Pet. App. A at

4a). Svenson expressed a concern that use of intoxicants slowed the reaction time of athletes, and thereby made them more susceptible to injury. 796 F. Supp. at 1357 (Pet. App. B at 81a).[5] That concern was corroborated by testimony from Dr. Robert L. Dupont, a nationally recognized expert on drug abuse.[6]

The school administrators feared that the corruption of the school's leading athletes would have a significant poisoning impact upon the broader student population, including the younger and

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[5] Svenson also testified that a student injured in a regular physical education class is much more apt to disclose an injury than one engaged in interscholastic activity, given the highly competitive atmosphere of the latter. This sense of pride and desire to stay in the game, when coupled with the numbing influence of drugs, became a significant concern to all involved in the athletic program. *Id.*, (Pet. App. B at 82a).

[6] Dr. DuPont explained the deleterious effects of drugs and alcohol on a teenager's motivation, memory, judgment, reaction, coordination and performance. *Id.*, (Pet. App. B at 81a).

more impressionable elementary school students who emulated the older athletes. *Id.*, (Pet. App. B at 83a).

The evidence at trial "amply demonstrate that the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion." *Id.*, (Pet. App. B at 85a). Disciplinary actions had reached "epidemic proportions." *Id.* The administration concluded that the rebellion "was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture." *Id.*, (Pet. App. B at 85a-86a). The administration also concluded that, unless it took immediate action, the problem would worsen and become more widespread. At one point, the administration felt the

only practical solution was mass expulsion. 796 F. Supp. at 1357-58 (Pet. App. B at 86a).[7]

Having tried all other reasonable alternatives, the District began investigating drug testing in 1988. The District conducted a study of such programs in other parts of the country. 796 F. Supp. at 1358 (Pet. App. B at 86a-87a). The District obtained a lawyer, considered legal opinions and held meetings of interested parents. In 1989, the District board approved a drug testing program. *Id.*, (Pet. App. B at 87a).

The policy involved testing by urinalysis for amphetamines, marijuana, co-

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[7] The Ninth Circuit reviewed the record and found,"... that drug use appeared to be more extreme than it should be and even appeared to be growing. It was sufficient to give them [Vernonia administrators and faculty] concern for the future of the youth they had responsibility for. Based upon the evidence, we cannot say that concern was unreasonable." 23 F.3d at 1519 (Pet. App. A at 20a).

caine and LSD. 23 F.3d at 1517. (Pet. App. A at 7a). It was limited in scope to student athletes and narrowly tailored to effectuate the District's objectives. The District took significant steps to limit the extent of the intrusion, to protect the chain of custody and to maintain the confidentiality of the results. As the Ninth Circuit found, the policy was completely random and vested no discretion in any District officials. 23 F.3d at 1522 (Pet. App. A at 36a-37a).[8]

Penalties imposed for positive tests where progressive, ranging from participation in a drug treatment program with weekly testing to suspension from athletics for the current and two subsequent

[8] The mechanics of the policy were never in dispute. They are set forth adequately and concisely in the district court's opinion, 796 F. Supp. at 1358-1359 (Pet. App. B at 87a-91a) and in the Ninth Circuit's opinion, 23 F.3d at 1516-17 (Pet. App. A at 4a-6a).

athletic seasons.[9] Results were not disclosed to criminal authorities and could not be used for school disciplinary proceedings such as suspension or expulsion from school. 796 F. Supp. at 1364 (Pet. App. B at 121a).

Finally, as the Ninth Circuit acknowledged, the policy accomplished its

[9] If a student tested positive and that test was confirmed by a second test, the parents were notified. A due process hearing was then held by the principal with the student and parents. For a first offense, the student was given the option of: (a) participating in an assistance program and taking weekly urinalysis for six weeks; or (b) suspension from athletics for the remainder of the current season and next athletic season. The student would then be retested prior to the start of the next athletic season for which he or she was eligible. 796 F. Supp. at 1358-1359 (Pet. App. B at 91a-92a). As the policy is written, a second offense resulted in the student being suspended from participating in athletics for the remainder of the current season and the next athletic season for which he or she was eligible. 23 F.3d at 1517 (Pet. App. A at 8a). However, although not spelled out in the policy, a student athlete who committed a second offense was allowed to continue participating in sports if he or she submitted to counseling and weekly urinalysis. 796 F. Supp. at 1359 (Pet. App. B at 92a). The third offense resulted in the student's suspension from athletics for the remainder of the current season and the next two athletic seasons. 23 F.3d at 1517 (Pet. App. A at 8a).

desired goal. "Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented." 23 F.3d at 1522 (Pet. App. A at 34a).

Trial Court Proceedings.

The district court had jurisdiction over the Fourth Amendment claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the Oregon constitutional cause of action under 28 U.S.C. § 1367(a). 23 F.3d at 1517 (Pet. App. A at 10a). The district court ruled that the District's drug-testing policy did not violate either the federal or state constitutions and entered a judgment dismissing the action. 796 F. Supp. at 1368 (Pet. App. B at 143a). The district court found

that several factors weighed in favor of the District's drug testing policy including: (1) evidence of specific instances where coaches had observed athletes performing unsafely under the influence of intoxicants; (2) evidence that athletes in the District's schools were role models for this entire community so that deterring athletes from drug use would also deter other students; (3) the fact that the policy was limited in scope and narrowly tailored to effectuate the District's objectives; (4) the fact that the policy was implemented in a middle and high school setting, where courts should accord deference to school administrators "in matters concerning discipline and maintaining order;" (5) the facts that the District considered and actually tried several alternative meth-

ods of dealing with the increase of drug and alcohol disciplinary problems before instituting its drug testing program, and that less intrusive "screening" methods for detecting drug use have proven ineffective; (6) the facts that the District had taken significant steps to limit the extent of the intrusion including confidentiality of the results, that the results were not disclosed to criminal authorities and that the test results could not be used for school disciplinary proceedings such as suspension or expulsions; and (7) the fact that the program limited the degree of discretion that could be exercised by coaches and school administrators. 735 F. Supp. at 1363-65 (Pet. App. B at 115a-122a).

The Ruling of the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit reversed the judgment of the District Court and held that the District's drug-testing policy violated the Fourth Amendment and therefore violated Article I, Section 9 of the Oregon Constitution. 23 F.3d at 1526 (9th Cir. 1994) (Pet. App. A at 59a-60a).[10] The Ninth Circuit found both that petitioner's drug testing policy contrib-

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[10] The Ninth Circuit noted that the Oregon courts have never decided a random drug testing case, leaving the court "without a compass that clearly points us in the right direction unless we use a federal compass." 23 F.3d at 1518 (Pet. App. A at 16a). The court then stated:

> Therefore, in our ensuing discussion we will, to the extent possible, refer to the guideposts set out for us by the Oregon courts. But, particularly in the specific area of urine testing—the core issue in this case—we will unabashedly refer to federal law and decide the case based upon the Fourth Amendment, confident in our view that Oregon itself would do no less.

23 F.3d at 1519 (Pet. App. A at 17a-18a).

uted to reaching the desired goal of reducing drug use among students, and that it was nondiscretionary because it was truly random. 23 F.3d at 1522 (Pet. App. A at 34a-37a). Despite these findings, the Ninth Circuit held:

> Given the Fourth Amendment, given our traditions, given our law, we are constrained to hold that the Policy is invalid under the Fourth Amendment. That being so, Oregon would find it invalid under Article I, Section 9, of its Constitution. . . .

23 F.3d at 1527 (Pet. App. A at 65a).

In a concurring opinion, Judge Reinhardt emphasized that the Ninth Circuit's opinion holds that the policy violates the Fourth Amendment to the United States Constitution as well as Article I, Section 9 of the Oregon Constitution. Justice Reinhardt wrote:

> Although I am in complete agreement with the reasoning

> and the result in Judge Fernandez's opinion for the court, I write separately to emphasize that while our opinion holds expressly that Vernonia School District's drug testing policy is violative of Article I, Section 9 of the Oregon Constitution, it also necessarily holds that the policy violates the Fourth Amendment to the United States Constitution. Indeed, the opinion cannot be read otherwise: there is no way to "avoid" a federal constitutional holding in this case, because Article I, Section 9 and the Fourth Amendment are textually identical and are interpreted "coextensively." Moreover, our decision is based almost exclusively on the application of federal law. Under the circumstances, our holding cannot be confined to one of Oregon law.

23 F.3d 1527 (Reinhardt, J., concurring) (Pet. App. A at 65a-66a).

REASONS FOR GRANTING THE PETITION

1. The Holding Below Directly Conflicts with an Existing Seventh Circuit Holding.

The Ninth Circuit's decision below directly conflicts with an existing hold-

ing by the Seventh Circuit in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.3d 1309 (7th Cir. 1988) *reh'g denied* (1989).[11] In *Tippecanoe*, the Seventh Circuit held that a high school's random drug testing program, which was very similar to the District's drug testing program, is valid under the Fourth Amendment. 864 F.2d at 1322. As the Ninth Circuit tersely summarized: "[I]n a nutshell, we simply do not agree with the Seventh Circuit." 23 F.3d at 1527. (Pet. App. A at 63a).

The student athletes in *Tippecanoe* and their parents were required to sign a form consenting to urinalysis. The students had assigned numbers, and the num-

[11] This Court's Rule 10.1(a) includes as one of the reasons it will consider for granting a writ of certiorari: "When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter ..."

bers were randomly drawn to select students for testing. Testing was carefully monitored and conducted by a private laboratory, and all positive tests were repeated. Students and parents or guardians were allowed to explain any positive result. 864 F.2d at 1311.

The penalty imposed under the *Tippecanoe* policy was suspension from participation in interscholastic sports, with the percentage of suspension ranging from 30% of remaining games (first positive result) to suspension from all interscholastic sports programs during the remainder of a student's high school career (fourth positive result). No other penalties were imposed and students could decrease the specified punishment by participating in an approved drug counseling program. *Id.*

The school administrators in *Tippecanoe* also faced a serious drug problem among student athletes, although on balance the instant case was even worse. As is noted above, substantial evidence in this case demonstrated "that the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, were in a state of rebellion. 796 F. Supp. at 1357 (Pet. App. B at 85a).

In light of this court's holding in *New Jersey v. TLO*, 469 U.S. 325 (1985), the appellate court in *Tippecanoe* first held that the probable cause and warrant requirements were not applicable to the program, and that the appropriate method for determining constitutionality was to apply the "general fourth amendment stan-

dard of reasonableness." 864 F.2d at 1315. However, because the program was not based upon any individualized suspicion, the court held the school district to a "heavier burden" to justify its program. *Id.* The court balanced the privacy interests of the students against the government's objectives and the nature and degree of the intrusion and then upheld the constitutionality of the policy, concluding:

> [T]he convergence of several important factors convinces us that the searches involved here take place in one of the relatively unusual environments in which suspicionless searches are permissible: interscholastic athletes have diminished expectations of privacy, and have voluntarily chosen to participate in an activity which subjects them to pervasive regulation of off-campus behavior; the school's interest in preserving a drug-free athletic program is substantial, and cannot adequately be furthered by less intrusive measures; the

> TSC program adequately limits the discretion of the officials performing the search; and the information sought is intended to be used solely for noncriminal educational and rehabilitative purposes. Based on a careful and considered weighing of these factors, we conclude that the TSC urinalysis program does not violate the fourth amendment.

864 F.2d at 1322 (footnote omitted). The court found that the school board in *Tippecanoe* was "entitled to considerable deference" in implementing its drug testing program because the board likely knew "how to best deal with a serious threat to the school's learning environment." 864 F.2d at 1321.

The holding in *Tippecanoe* contrasts starkly with the Ninth Circuit's holding:

> Thus, when we mix all of the elements together - the slight weight in favor of efficiency, the privacy interest, the governmental interest, and the discretionary factor - and step back to look at the compound

> they yield, it becomes apparent that the Policy violates the Fourth Amendment. It follows that it also violates Article I, Section 9 of the Oregon Constitution.

23 F.3d at 1526 (Pet. App. A at 59a-60a).

The Ninth Circuit squarely acknowledged the direct conflict between its holding and that in the *Tippecanoe* case:

> Before concluding, we must acknowledge that in *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988), the court upheld a random drug testing program very similar to the one we now review. Perhaps that court found a more compelling set of facts than we discover here, but we are unable to say so after reading the opinion. We believe, instead, that the Seventh Circuit has unduly minimized the privacy interests of students. It has also given undue weight to the governmental interest by focusing on the general problems generated by the drug plague, rather than upon the question of whether the danger to safety is so high as to be compelling.[3] We could fill more pages reiterating what we have already said, but, in a nut-

shell, we simply do not agree with the Seventh Circuit.

23 F.3d at 1527 (Pet. App. A at 62a-63a).[12]

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[12] The footnote in the quoted passage says:

> We note that the *Schaill* court balanced the students' privacy interests against the school district's "*substantial* interest in enforcement of its proposed random urinalysis program." 864 F.2d at 1321 (emphasis added). In contrast, subsequent Supreme Court cases have allowed random urinalysis programs only after finding *compelling* governmental interests that outweigh employees' diminished expectations of privacy. *See Skinner*, 489 U.S. at 626-33, 109 S. Ct. at 1418-21; *Von Raab*, 489 U.S. at 670-77, 109 S. Ct. at 1393-96.

23 F.3d at 1527 n. 3 (Pet. App. A at 63a).

The subsequent cases referred to in that footnote apply a "compelling governmental interest" standard to random drug testing in non-school settings. As noted in Section 2 below, given this Court's holding in *New Jersey v. TLO*, 469 U.S. 325 (1985), which allows a more flexible Fourth Amendment standard in schools, it is doubtful that the "compelling governmental interest" standard applies to drug testing by school administrators. Thus, it is unlikely the Seventh Circuit would apply any different standard in the school setting today.

In fact, the Seventh Circuit has since cited *Tippecanoe* without casting any doubt on its continuing validity. In *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991), the Seventh Circuit, sitting *en banc*, upheld the constitutionality of random drug testing of horse race participants by a state racing board. In doing so, the court

This case therefore presents a clear conflict between the circuits. As a result of the Ninth Circuit's decision, middle and high schools in Oregon, Washington, Idaho, Montana, Nevada, Alaska, Arizona, Hawaii and California are prohibited from conducting random drug testing to safeguard the health and safety of student athletes. On the other hand, high schools in Indiana, Illinois and Wisconsin may conduct such testing. School officials in other states can only guess as to the constitutionality of drug testing of middle and high school athletes, but will inevitably be deterred by the risk of incurring massive legal ex-

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divided random drug testing cases into three categories: transportation workers, the leading case being *Skinner*; government employees, the leading case being *Von Raab*; and sports cases. The Seventh Circuit in *Dimeo* placed *Tippecanoe* in the third category, saying that the decision there was based "on the idea that the Fourth Amendment applies with diminished force in schools". 943 F.2d at 685.

penses in challenges to the constitutionality of drug testing programs. The federal constitution should not be interpreted to have opposing meanings in different regions of the country, especially on an issue as important as this to the maintenance of our public schools.

2. This Case Presents the Opportunity for the Supreme Court to Expand its Holding in *New Jersey v. TLO* by Specifically Addressing School Searches in the Absence of Individualized Suspicion.

This Court recognized that high school students may be treated differently from adults for Fourth Amendment purposes in *New Jersey v. TLO*, 469 U.S. 325 (1985). There, a 14-year-old student was discovered smoking in the lavatory and was taken to the assistant vice principal's office. Upon hearing the report, the assistant vice principal searched the student's purse for ciga-

rettes. During the search, he discovered rolling papers, marijuana, a pipe, a fairly substantial amount of money and possible records of drug sales to other students. Thereafter, the State brought delinquency charges against the student and the admissibility of the items seized by the vice principal was ultimately appealed to the Supreme Court. 469 U.S. at 328-29.

The Supreme Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applied to searches conducted by public school officials, but that the school setting requires some "easing" of the usual Fourth Amendment restrictions to enable school administrators to preserve order and maintain an adequate, educational environment. 469 U.S. at 334, 339-340. The

Supreme Court held that, ". . . the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. The Court explained further:

> Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.

469 U.S. at 342 (footnote omitted). The Supreme Court noted that it was not at that point deciding "whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities." 469 U.S. at 342, n. 8. But the Court added that ". . . the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* quoting *United States v. Martinez-Fuente*, 428 U.S. 543, 560-61 (1976). Thus, while *TLO* provided invaluable guidance to school administrators regarding searches of students and certainly shed light on the issue presented in the instant case, it did not directly address the application of the Fourth Amendment in schools in the absence of individualized suspicion. This case presents the Court with an opportunity to address the issue which was not addressed in *TLO*, by deciding if and under what circumstances middle and high school searches without individualized suspicion are constitutionally valid. This issue is of great importance to educators attempting to deal with drug problems in schools.[13] As the administrators

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[13] This Court's Rule 10.1(c) includes as one of the reasons it will consider granting a writ of certiorari: "When a . . . United States court of appeals has decided an important question of

of the District found in this case, the deterrence provided by random drug testing may be the only effective way to deal with a drug use epidemic among school children.[14]

Clearly drug abuse and its attendant discipline problems in public schools nationwide can pose a serious threat to the education of our children, requiring in some circumstances a more flexible Fourth Amendment standard than that applied in non-school settings. As this

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federal law which has not been, but should be, settled by this Court."

[14] At trial, Dr. Dupont testified that visual observations (even by professionals) are not reliable indicators of whether a student has consumed alcohol or drugs. He testified that, since many people do not display outward manifestations of drug or alcohol abuse, application of the reasonable and individualized suspicion standard is an unreliable and impractical tool to aid in preventing accidents before they happen. 796 F. Supp. at 1364 (Pet. App. B at 120a). The District Court found Dr. Dupont's testimony "particularly persuasive on the significant deterrent effects that a random drug testing program can have on a youthful population." 796 F. Supp. at 1363. (Pet. App. B at 116a).

Court noted in *TLO*:

> Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. See generally 1 NIE, U. S. Dept. of Health, Education and Welfare, Violent Schools--Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." *Goss v Lopez*, 419 U.S., at 580. Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary proce-

> dures, and we have respected the value of preserving the informality of the student-teacher relationship. See *id.*, at 582-583; *Ingraham v Wright*, 430 U.S. at 680-682.

469 U.S. at 339-340.

In the instant case, a "large segment of the student body, particularly those involved in interscholastic athletics . . . was in a state of rebellion. Disciplinary action had reached epidemic proportions." 796 F. Supp. 1357 (Pet. App. B at 85a).

At issue here is whether it is reasonable for school authorities to impose random drug testing where they are faced with a drug and disciplinary problem that threatens the very fabric of the school, and where they have tried all lesser measures conceivable by them to deal with the problems created by student drug abuse. School officials across this na-

tion deal with variations on the same, catastrophic theme presented here. The directly opposing holdings in *Tippecanoe* and *Acton* leave public school officials in need of guidance on the standard to be imposed where, as here, a serious drug and classroom discipline problem requires random searches. This Court would do a great service by addressing the unresolved issue in *TLO*: the validity of random testing in public schools in the absence of individualized suspicion.

The Ninth Circuit mentioned *TLO*, but did not pay heed to the requirement of *TLO* that there be an "easing" of Fourth Amendment restrictions and a "degree of flexibility" in the school setting. 23 F.3d at 1522, 1525 (Pet. App. A at 35a-36a and 52a-53a). The Ninth Circuit instead held the school district here to

exactly the same, "compelling governmental interest" standard this Court required for random drug testing in the non-school settings presented in *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 617 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), 23 F.2d at 1526 (Pet. App. A at 57a-59a). *TLO* authorizes a more flexible standard for searches in schools than for searches in non-school settings.[15] The Ninth Circuit ruled out

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[15] As the district court concluded on the basis of *TLO*:

> Although the types and magnitude of safety and security concerns addressed in *Skinner* and *Von Raab* differ from those faced by students, teachers and coaches who participate in middle and high school athletic programs, courts have acknowledged that the public school is a unique setting in which the constraints of the Fourth Amendment are "relaxed." . . . Thus, although student athletes who use drugs do not pose the magnitude of a threat to society that, say, an intoxicated air traffic controller might, the fact that the searches take place within the school setting, as part of a program designed to maintain discipline, enforce athletic program regulations, and protect the safety of student athletes, is a significant factor that must weigh heavily in any balancing process.

796 F. Supp. at 1361 (Pet. App. B at 102a-105a).

such a flexible standard that accounts for the specific problems and concerns of the school setting. In so doing, the Ninth Circuit denied those school officials the "degree of flexibility" this Court has recognized is necessary to maintain security, order and an environment conducive to education in the schools. 469 U.S. at 339-340.

That is patently unfair to a school administration such as the one in Vernonia which was "at its wits end." 796 F. Supp. at 1357 (Pet. App. B at 85a). The job of school officials is to educate the children who are their students. Educa-

tion cannot occur where, as the district court found here, disciplinary problems are "epidemic" and mass expulsions seem the only reasonable alternative to drug testing. *Id.*, (Pet. App. B at 85a-86a). This Court should specifically consider the issue of suspicionless drug testing in schools in light of its holding in *TLO*.

3. Educating Children in an Environment Free From Drugs, Excessive Discipline Problems and a Heightened Risk of Physical Injury Justifies Urinalysis Drug Testing of Student Athletes.

As noted above, given the holding in *TLO*, it is not at all clear that the District was required to show a "compelling governmental interest" to justify its drug testing program. But even if such a showing were required, the Ninth Circuit erred in holding that school officials do not have a compelling governmental inter-

est in dealing with an epidemic of drug use and discipline problems like that presented in the Vernonia schools. In his concurring opinion in *TLO*, Justice Powell, joined by Justice O'Connor, recognized that a state has a "compelling interest" in educating and training its young people:

> The primary duty of the school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same

> force and effect in the schoolhouse as it does in the enforcement of criminal laws.

469 U.S. at 350 (Powell, J., concurring) (footnote omitted). Similarly, Justice Blackmun, in his concurrence, noted that:

> Education "is perhaps the most important function" of government, *Brown v. Board of Education*, 347 U.S. 483, 493, and government has a heightened obligation to safeguard students whom it compels to attend schools.

469 U.S. at 353 (Blackmun, J., concurring).

The Ninth Circuit nevertheless rejected the argument that the District's interest was sufficiently "compelling" to justify drug testing. 23 F.3d at 1526 (Pet. App. A at 57a-59a). The Ninth Circuit acknowledged the tragedy of drug usage by students:

> Having uncaring, disrespectful, drug impaired children in our schools is tragic. Having them

> anywhere is equally tragic. In fact, it is tragic to have adults of that type in our society. It is widely conceded that what drug usage has done to the fabric of our society is a tragedy of national proportions.

23 F.3d at 1526 (Pet. App. A at 57a-58a). But the Ninth Circuit apparently did not believe that the conditions facing the Vernonia school administration were "tragic" enough to justify the solution the District was driven to impose. According to the Ninth Circuit, suspicionless drug testing requires, "some additional horrible event, some terrible threat to society that can flow from the presence of drugs - some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." 23 F.3d at 1526 (Pet. App. A at 58a).

In other words, the Ninth Circuit

concluded that the risk of someone being shot or involved in a train crash is of a greater magnitude than the risk that a child participating in high school or middle school athletics will be seriously injured on the playing field as a result of drug use, or that a whole school, following the lead of student athletes, will suffer from an "epidemic" of drug abuse and disciplinary problems. The shootings and train crashes which the Ninth Circuit said justify drug testing may, at first glance, seem more dramatic than the tragedy that faced the teachers and administrators in the Vernonia schools. But that is deceptive.

The situation presented to the teachers and administrators in Vernonia, had it not been promptly remedied, would have had a profound, negative effect on

every student in the Vernonia public schools. It is obvious that education cannot occur in an environment poisoned by a significant number of children abusing drugs. It is equally obvious that school officials cannot preserve the safety of students playing sports under the influence of drugs. As Justice Blackmun noted in his concurrence in *TLO*, government has a "heightened obligation to safeguard" these very students. 469 U.S. at 353.[16] Public school offi-

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[16] Petitioner recognizes that this Court recently denied the petition for writ of certiorari in *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993), *cert. denied* __ U.S. __, 114 S. Ct. 1646 (1994). That case presented the issue of whether the University of Colorado's random, suspicionless drug testing of college athletes violated the Fourth Amendment to the United States Constitution. 863 P.2d at 930. But the instant case is readily distinguishable from *Derdeyn*. Respondents' ward was a 12-year-old grade school student, not an adult intercollegiate athlete at a major university. The District is charged with protecting its young students in a way that a major university for adult students is not. There is also an inculcative role which society has assigned to our grade schools and high schools, which is not expected

cials dedicated to educating and protecting students should not be left without the tools available to accomplish the crucial job our society has assigned to them. This Court should establish a national standard for drug testing in schools.

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of a major university. The duty of establishing discipline, maintaining order, and protecting and nurturing students is far greater in middle schools and high schools than in colleges.

The district court in the instant case pointed out that *Derdeyn* involved students who have, for the most part, reached the age of adulthood, and then distinguished *Derdeyn* as follows:

> University programs are far less structured, class attendance is voluntary and discipline is largely left to the students. I also note that the role of an athletic program on a large University is far different than that of a rural middle school or high school with limited alternative activities. 796 F. Supp. at 1363-64, n. 7 (Pet. App. B at 118a).

Derdeyn is also distinguishable because there was no evidence in that case of actual drug problems or drug related injuries among the University's athletes. *See, University of Colorado v. Derdeyn*, 863 P2d at 933.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: September 28, 1994.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-35520

WAYNE ACTON and JUDY ACTON, guardians ad litem for JAMES ACTON,
Plaintiffs-Appellants,

v.

VERNONIA SCHOOL DISTRICT 47J,
Defendant-Appellee.

Argued and Submitted November 3, 1993
Decided May 5, 1994

[23 F.2d 1514]

Before: Stephen Reinhardt, Melvin Brunetti, and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Fernandez; Concurrence by Judge Reinhardt.

FERNANDEZ, Circuit Judge:

Wayne and Judy Acton, guardians ad litem for James Acton, appeal the district court's judgment at trial that the Vernonia School District's mandatory random drug testing policy for

participants in interscholastic athletics ("the Policy") does not violate James's right to be free from unreasonable searches, under either Article I, Section 9 of the Oregon Constitution or the Fourth Amendment. We reverse.

BACKGROUND

The District runs two schools, Washington Grade School and Vernonia High School. Several teachers in the District testified that prior to 1985 drugs and alcohol were used by only a small group of students and that there were very few discipline problems in the schools. Between 1985 and 1989, however, teachers and administrators began to perceive a marked increase in disciplinary problems, student drug use, and the glorification of drug culture. Athletic coaches noticed an increase in the number and

severity of injuries, which they attributed to greater drug use. They testified to a number of incidents where students had, or were suspected to have, used drugs. They personally saw some of the problems, but were told of others. Some of the involved students were athletes and others were not. Among other things, one teacher had often seen students smoking marijuana during the school day at a coffee shop across the street from the high school. An English teacher received several essays describing and glorying in scenes of student drug and alcohol use. At one wrestling meet a boy was seriously injured when he failed to perform a basic well-drilled safety maneuver. The student's hotel room smelled of marijuana when the coach later went to check on his

condition. Parents reported that they had heard of drug use on a football trip, and students confronted by the principal admitted that they had used marijuana. Students even formed rowdy groups. One group called itself the "Big Elk." It was composed largely of athletes. Another group called itself the "Drug Cartel."

By 1989, Mr. Aultman, the principal of the grade school, and his faculty felt that they had to do something to combat the growing drug problem. They had attempted drug education programs and even a drug-sniffing dog, but they noticed no decrease in disciplinary problems or in drug use. They decided to institute the Policy.

The Policy was unanimously adopted by the Vernonia School Board in the fall of 1989. By its terms, all students who

want to participate in interscholastic athletics are required to sign a form authorizing the District to perform a drug test on a urine sample provided by the student. All interscholastic student-athletes are tested at the beginning of each athletic season in which they compete. During the season, student athletes are tested at random on a weekly basis.

Boys and girls are tested in different areas of the school. Girls go to the office of Ms. King, the director of girls' athletics, and boys go to the boys' locker room. Each student fills out part of a specimen control form, which assigns a number to the specimen. The faculty monitor then gives the student a testing packet, which contains a cup and a vial. Boys go to the urinals

in the boys' locker room bathroom and produce a specimen in the cup. A male faculty member, either Mr. Aultman or Mr. Svenson, a coach, is seated on a bench some 12 to 15 feet away while the boy urinates. The student remains fully clothed with his back to the monitor. At no time does the monitor have a view of the student's genitals. Aultman and Svenson testified that they do not always watch the student while he produces the specimen, but they generally listen for the normal sounds of urination. After the student produces the specimen, he returns the cup to the monitor who checks it for temperature and obvious signs of tampering. The monitor pours the specimen into the vial. The procedure for girls differs only slightly.

Samples are sent to Metrolab, a private company that specializes in drug testing by urinalysis. Security procedures protect the chain of possession and the identity of the student. The tests screen for creatinine, amphetamines, cocaine marijuana and LSD. They are approximately 99.94% accurate. Test results are reported by telephone to authorized District personnel. Positive tests are mailed to the District's superintendent.

If a student's test returns positive, a second test is administered as soon as possible to confirm the results. The District notifies the student's parents after the second positive test. If the second test is negative, no disciplinary action is

taken. A student who returns two positive tests is given two options. The student may either participate in a drug counseling program for six weeks and submit to weekly drug tests or accept a suspension from the athletic program for the remainder of the current season and the entire following athletic season.

For the second offense, the Policy states that a student is suspended from participating in athletics for the remainder of the current season and the next athletic season, with no other option. The third offense draws a suspension for the remainder of the current season and the next two athletic seasons with no opportunity to reduce the penalty. Any student who refuses to submit to a drug test at any time is suspended from the team for the remainder

of the athletic season.

James was a seventh grader at Washington Grade School during the 1991-92 academic year. In the fall, he tried out for the football team. At the first practice team members were given drug testing consent forms to sign and to have their parents sign. James brought the form home, but he and his parents decided that they did not want to sign the form. Because James refused to consent to drug testing, he was suspended from interscholastic athletics for the season. No evidence suggested that James has ever used drugs or that the District has any reason to suspect that he has.

James's parents brought this action claiming that the Policy violated James's right to be free from unreasonable government searches under both the Fourth

Amendment of the United States Constitution and Article I, Section 9 of the Oregon Constitution. After a trial, the district court rejected both claims. *Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354 (D.Or.1992) *(Acton I)*. This appeal ensued.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over the Fourth Amendment claim under 28 U.S.C. § 1331. It had supplemental jurisdiction over the Oregon constitutional cause of action. 28 U.S.C. § 1367(a). We have jurisdiction under 28 U.S.C. § 1291.

We review the district court's findings of fact for clear error. Fed.R.Civ.P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). Questions of federal law are reviewed de novo, *Bordallo v. Reyes*, 763 F.2d 1098, 1102 (9th Cir.1985), as are questions of state law, *In re McLinn*, 739 F.2d 1395, 1403 (9th Cir.1984) (en banc).

DISCUSSION

The Actons assert that the District failed to prove that there actually was a drug problem. They say that there was no foundation upon which to build a drug policy. They go on to argue that even if there were a drug problem, it did not justify a random testing program. We disagree with their first contention, but

agree with the second one.

Before turning to a discussion of the substantive issues, we must address the somewhat arcane question of whether we should decide this case on the basis of the Oregon Constitution or on the basis of the United States Constitution. We have held that when the state and federal constitutional provisions are "coextensive," we can decide the federal constitutional claims because that will also decide the state constitutional claims. *See Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 705 n.4 (9th Cir.1992). However, if they are not coextensive and the state constitution actually gives more protection than the federal constitution, we decide validity under the state constitution in order to avoid addressing federal constitutional

claims unnecessarily. *See, e.g., Ellis v. City of La Mesa*, 990 F.2d 1518, 1524 (9th Cir.1993); *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992). Oregon presents us with a variation on these themes.

The language of Article I, Section 9 of the Oregon Constitution regarding searches and seizures is almost exactly the same as the language of the Fourth Amendment. To the extent the provisions read differently, the Oregon courts have said that the language differences are of no consequence. *See State v. Flores*, 280 Or. 273, 279-81, 570 P.2d 965, 968-69 (1977). Nonetheless, Oregon insists that its constitutional provision can give more protection than the federal constitution and that it sometimes does

so. *See State v. Caraher*, 293 Or. 741, 748-50, 653 P.2d 942, 946-47 (1982); *see also State v. Florance*, 270 Or. 169, 182-83, 527 P.2d 1202, 1208-09 (1974), *overruled on other grounds by Caraher*, 293 Or. at 748-50, 653 P.2d at 946-47. For example, in *Nelson v. Lane County*, 304 Or. 97, 743 P.2d 692 (1987)(*Nelson II*) the court found, in effect, that a roadblock stop violated the Oregon Constitution due to a lack of proper authorization, despite the fact that it would not violate the Fourth Amendment. *Id.* at 101-11, 743 P.2d at 694-700. We say "in effect" because it is not entirely clear whether the authorization requirement is a matter of general law rather than a matter of Oregon constitutional analysis. In any event, it must be taken into account when the

Oregon constitutional provision is analyzed. Furthermore, Oregon courts, or judges on those courts, have gone out of their way to insist that the federal constitutional analysis does not control Oregon search and seizure analysis. *See, e.g., Nelson II*, 304 Or. at 101-02, 743 P.2d at 694; *State v. Boyanovsky*, 304 Or. 131, 137, 743 P.2d 711, 714 (1987) (Gillette, J., specially concurring); *Caraher*, 293 Or. at 748-52, 653 P.2d at 946-48; *Nelson v. Lane County*, 79 Or.App. 753, 760, 720 P.2d 1291, 1296 (1986) (*Nelson I*);[1] *see also State v. Ainsworth*, 310 Or. 613, 619 n.8, 801 P.2d 749, 752 n.8 (1990) (aerial search questions for

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[1] This case was affirmed on other grounds in *Nelson II*. Thus, this iteration of the case is probably not controlling precedent. *See Rogers v. Saylor*, 88 Or.App. 480, 483-84, 746 P.2d 718, 720 (1987), *rev'd on other grounds*, 306 Or. 267, 760 P.2d 232 (1988).

Oregon purposes are different from what they are for federal purposes. The result, however, appears to be the same).

We are therefore constrained, in the first instance, to decide this case on Oregon constitutional grounds. That, however, is no mean task. Oregon law regarding random searches in general is not entirely clear. More importantly, as far as we can ascertain, the Oregon courts have never decided a random drug testing case. We are, therefore, left without a compass that clearly points us in the right direction unless we use a federal compass. We can say with absolute confidence that the Oregon Constitution will not be construed to offer less protection than the Fourth Amendment. It is highly likely that it will be found to offer more protection.

We also take note of the fact that the Oregon Supreme Court itself has often decided cases by declaring that "although . . . at liberty to adopt a stricter test," it will apply Fourth Amendment analysis because that is, at least, a floor. *State v. Tourtillott*, 289 Or. 845, 854, 618 P.2d 423, 427 (1980), *cert. denied*, 451 U.S. 972, 101 S.Ct. 2051, 68 L.Ed.2d 352 (1981). Having done that, the court has then gone on to state that a particular search violates neither the Fourth Amendment nor Article I, Section 9. *Id.* at 859, 618 P.2d at 430; *see also Flores*, 280 Or. at 277-82, 570 P.2d at 967-70.

Therefore, in our ensuing discussion we will, to the extent possible, refer to the guideposts set out for us by the Oregon courts. But, particularly in the

specific area of urine testing—the core issue in this case—we will unabashedly refer to federal law and decide the case based upon the Fourth Amendment, confident in our view that Oregon itself would do no less.

I. Evidentiary Questions

The Actons make two basic challenges to the district court's finding that a drug problem existed. They argue that much of the evidence upon which the court relied was inadmissible hearsay. Insofar as the court relied on admissible evidence, they contend that it shows only that the faculty in the District believed that there was a drug problem, not that there actually was one.

The district court found that the Policy is limited to the one activity that is likely to have the greatest

impact "on the drug and alcohol abuse problem[,]" *Acton I*, 796 F. Supp. at 1363, that there was "ample evidence in the record to support the [D]istrict's claim that alcohol and drug use were the primary causes of disruptions and disciplinary problems during school hours," *id.* at 1367, and that "coaches have observed athletes perform poorly and unsafely while under the influence of some intoxicant." *Id.* at 1363.

The underlying evidence need not be extensively reported here. We, however, have read the record. It demonstrates that both the administrators and the faculty beheld instances of drug use and glorification. They also perceived actions of athletes and others that were so far out of the norm that use of drugs was a logical inference. Besides that,

they were told of incidents by others who were concerned and who had no reason to lie. Perhaps dubbing this a "problem" is a matter of perception or definition. What appears to be a problem in one place might seem to be a minor annoyance elsewhere. Suffice it to say that drug use appeared to be more extreme than it should be and even seemed to be growing. It was sufficient to give them concern for the future of the youths they had responsibility for. Based upon the evidence, we cannot say that the concern was unreasonable. Similarly, we cannot say that the district court committed clear error in finding the facts.

However, we reemphasize that what the evidence shows, and all it shows, is that there was some drug usage in the schools, that student discipline had

declined, that athletes were involved, and that there was reason to believe that one athlete had suffered an injury because of drug usage and others may have. Moreover, administrators, teachers, parents, and ultimately the school board were deeply concerned and they developed the Policy in order to deal with the "problem."

II. Constitutional Analysis

Article I, Section 9 of the Oregon Constitution provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

As we have already said and as can be plainly seen, this phraseology is not

materially different from that of the Fourth Amendment. In Oregon, the courts ask three questions when they are considering an Article I, Section 9 search case: was there a search; did the executive official have the authority to conduct the search; and was the search reasonable? So will we.

We first turn to the question of whether the conduct of a government official constitutes a "search" in the constitutional sense. *See State v. Gerrish*, 311 Or. 506, 510, 815 P.2d 1244, 1246 (1991); *Ainsworth*, 310 Or. at 616-17, 801 P.2d at 750. The Oregon Supreme Court has stated that "Article I, section 9, protects privacy and possessory interests from unreasonable governmental intrusion." *Id.* at 617, 801 P.2d at 751; *see also State v. Tanner*, 304 Or. 312,

319, 745 P.2d 757, 760 (1987) ("three interests [are] protected by section 9: privacy, property, and some sort of a . . . right to be protected from undignified, forcible violations of the person") (internal quotation and citation omitted). Any time a government inquiry intrudes upon one of these rights, it is an Article I, Section 9 "search." *See State v. Campbell*, 306 Or. 157, 170-72, 759 P.2d 1040, 1047-49 (1988); *State v. Owens*, 302 Or. 196, 206, 729 P.2d 524, 530 (1986).

Because the Oregon courts have not decided a urine testing case, we turn to Fourth Amendment law to decide if the collection and testing of urine is a search. Of course, it is. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402,

1413, 103 L.Ed.2d 639 (1989). Thus, it cannot be doubted that collection and testing pursuant to the Policy was a search within the meaning of Article I, Section 9. Given the requirements of the Fourth Amendment, it could hardly be otherwise.

The next question is whether the executive officials who executed the search had authority to do so. The Oregon Supreme Court has stated that "'the function of [Article I, Section 9] is to subordinate the power of executive officers over the people and their houses, papers, and effects to legal controls beyond the executive branch itself.'" *AFSCME Local 2623 v. Department of Corrections*, 315 Or. 74, 82, 843 P.2d 409, 414 (1992) (quoting *State v. Weist*, 302 Or. 370, 376, 730 P.2d 26, 29

(1986)). If a search is not authorized, the court's inquiry ends. The search violates the state constitution. *State v. Atkinson*, 298 Or. 1, 8-11, 688 P.2d 832, 836-38 (1984); *see Nelson II*, 304 Or. at 105-06, 743 P.2d at 696-97.

Constitutionally satisfactory authorization to search may come from one of four sources. First, in most cases, "[a]bsent consent, law enforcement officials must have a warrant to search...." *State v. Bridewell*, 306 Or. 231, 235, 759 P.2d 1054, 1057 (1988). A warrant is always sufficient authorization to search. Next, a warrantless search is permissible if it falls within one of the "specifically established and carefully delineated exceptions to the warrant requirement," that is, consent, search incident to

arrest, plain view, exigent circumstances, inventory search, and "stop and frisk." *Id*. Third, authorization by a legislative enactment that defines and limits official authority satisfies Article I, Section 9 in some cases. *AFSCME*, 315 Or. at 82-83, 843 P.2d at 414. Finally, even if a legislative grant of authority does not sufficiently limit the scope of executive discretion, the executive itself may provide limits by establishing a systematically administered program pursuant to its statutory authority. *Id*.

Oregon courts analyze "criminal" searches and "administrative" searches differently.[2] Criminal searches are only

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[2] The classification of a search depends upon "[t]he purpose of the search and the consequences that flow from it." *Nelson II*, 304 Or. at 104, 743 P.2d at 696. If the consequences of noncompliance with whatever standards the inspection is meant to uphold are noncriminal,

permissible under Article I, Section 9 if they conform with the warrant clause or one of its recognized exceptions. *Nelson II*, 304 Or. at 104, 743 P.2d at 696. By contrast, the warrant clause and its exceptions do not provide the exclusive authorizations for an administrative search. Oregon courts have also upheld administrative searches against Article I, Section 9 challenge, where they have been authorized by legislative enactments or administered according to executive programs that sufficiently limit official discretion. *AFSCME*, 315 Or. at 82-83, 843 P.2d at 414; *see State v. Boyanovsky*, 304 Or. 131, 133-34, 743 P.2d 711, 712

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the search is "civil, or "administrative." By contrast, if offenders face criminal sanctions, the inspection implicates criminal law enforcement purposes. *Id*. A search in the criminal context can be administrative in nature. *See Atkinson*, 298 Or. at 10-11, 688 P.2d at 837-38 (police inventory search).

(1987). The district court found that the Policy was properly authorized by a politically accountable body when it was adopted by a vote of the Board. *Acton I*, 796 F. Supp. at 1367. That finding is not challenged on appeal.

The third question is whether the search was "reasonable." Here again the analysis proceeds differently for criminal and administrative searches. Criminal searches are reasonable only if authorized by a warrant or an exception to the warrant requirement. No Oregon court has upheld a criminal search without finding that the executive official had a reasonable individualized suspicion that evidence of wrongdoing would be found on the person or at the place being searched. *Nelson II*, 304 Or. at 101, 743 P.2d at 694 ("searches for

evidence to be used in a criminal prosecution, conducted without a warrant or suspicion of wrongdoing violate Article I, section 9"); *see also Boyanovsky*, 304 Or. at 133-34, 743 P.2d at 712 (1987).

Administrative searches conducted pursuant to a warrant or an exception to the warrant requirement are also reasonable. An administrative search satisfies the reasonableness inquiry if its procedures require officers to have an individualized suspicion of wrongdoing before conducting a search. *See AFSCME*, 315 Or. at 83, 843 P.2d at 414. A suspicionless administrative search may also withstand a state constitutional challenge.

In *Tourtillott*, the Oregon Supreme Court held that a fixed game checkpoint,

at which police stop all cars travelling on certain roads to check for hunting licenses, does not violate Article I, Section 9 even though police do not have an individualized suspicion that they will discover evidence of wrongdoing in any particular car. 289 Or. at 859, 618 P.2d at 430. In reaching its decision, the court relied upon an analysis of federal law. In particular, it referred to *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). In *Prouse*, the Court developed a four part analysis for determining the reasonableness of random, suspicionless searches and seizures. As it said, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests

against its promotion of legitimate governmental interests." *Id.* at 654, 99 S.Ct. at 1396. From *Prouse*, four considerations, no one of which is determinative, can be distilled: (1) the importance of the governmental interests; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure - that is how well it contributes to the reaching of its purported goals and how necessary it is. *Id.* at 653-63, 99 S. Ct. 1396-1401. These are the factors that the Oregon Supreme Court identified and adopted. *See Tourtillott*, 289 Or. at 864, 618 P.2d at 433. That court then determined that a random search procedure which passed muster under the factors

"was not unreasonable under either the Fourth Amendment of the United States Constitution or Article I, section 9 of the Oregon Constitution." *Id.* at 859, 618 P.2d at 430.

It has since been suggested that the *Tourtillott* analysis was really made under the Fourth Amendment and was not a complete explication of the reach of Article I, Section 9. *See, e.g. Nelson II*, 304 Or. at 101-02, 743 P.2d at 694. Nonetheless, the Oregon Supreme Court has not substituted a new test, so if some nuance remains to be added to the *Prouse* and *Tourtillott* analysis, we are not aware of what that is. At any rate, we need not enter the lists on that issue. If *Tourtillott* does set forth the proper test under the Oregon Constitution, as it seems to, we must apply what amounts to

the *Prouse* analysis. If it does not, Oregon law is unclear, and we will turn to the federal constitution for guidance. There we find the *Prouse* test. Again, that will at least establish the floor, regardless of where Oregon may later discover the ceiling.

It is clear that the Policy authorizes administrative, not criminal, searches. It is equally clear that the school administrators do not obtain search warrants and do not claim that administration of the tests fits into one of the exceptions to the warrant requirement. Furthermore, the District concedes that, as is the case with most students who are tested, it had no reason to suspect that James has ever taken drugs. Testing is totally suspicionless. As a suspicionless, administrative search

program, the Policy can only withstand Article I, Section 9 challenge if the drug tests that it authorizes are reasonable, under the four factor analysis outlined in *Prouse* and *Tourtillott*.

Two factors weigh in favor of the Policy's constitutionality. The Policy contributed to reaching the desired goal. Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented. Thus, the efficiency factor weighs slightly in favor of the Policy. We say slightly because the exact nature of the goal is not entirely clear. If the goal was to avoid athletic injuries, testing of athletes was certainly a good way to

approach that problem. If the goal was to reduce drug use in the student body in general, testing athletes seems to be a considerably more roundabout way of reaching that goal. Furthermore, if, as the testimony showed, teachers and administrators could detect behavior and physical problems that rather clearly appeared to be drug related, a program designed to target those who displayed the problems might be more efficient, although it might also present difficulties of its own when it came to discretionary enforcement. Of course, the Supreme Court has recognized that a somewhat relaxed standard of suspicion may well justify searches of students. *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42, 105 S.Ct. 733, 743, 83 L.Ed.2d 720 (1985). That does not mean that the

Court decided that no form of individualized suspicion is required in schools. *Id*. at 342 n.8, 105 S.Ct. at 743 n.8. It does overcome some of the difficulty that is often mentioned when individualized testing is suggested. Certainly the Policy seems to have helped the District realize its goals of making the school run more smoothly. Its use and a return to normalcy coincided. Whether random testing was necessary to reach that goal is somewhat more questionable. However, on balance we believe the efficiency factor favors the District's position.

Moreover, neither party contests the district court's finding that drug testing under the Policy is completely random. Testing is initially required of all athletes and then conducted on a

lottery basis throughout the athletic season. It vests no discretion in any District officials. This favors the Policy. That leaves importance and intrusiveness. In this case they are dispositive. They dispose of the Policy.

In *Tourtillott*, the Oregon Supreme Court held that enforcing hunting and fishing laws was a sufficient state interest to justify a checkpoint at which police ask drivers for their hunting licenses, or if none was presented, for their driving licenses and automobile registrations. 289 Or. at 864-67, 618 P.2d at 433-34. The District contends that if the state's interest in freeing its forests and streams from unlicensed hunters and fisherman is important enough to justify a random search procedure, so is its interest in freeing its schools

from the pernicious effects of illegal drugs. We do agree that keeping children away from drugs is at least as important as keeping unlicensed hunters away from the forests, but we must reject the District's argument. The two situations are not at all comparable.

Tourtillott merely approved of a checkpoint stop. In 1976, the United States Supreme Court approved fixed immigration checkpoints in Texas and Southern California. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). Because the level of intrusion on privacy was so limited, the Court only required the government to justify the policy with a legitimate interest. *Id.* at 561-62, 96 S.Ct. at 3084-85. The desire to exclude illegal aliens was sufficient.

As we have already said, the Oregon appellate courts have never decided a random drug testing case. The federal courts have. When confronted with a random drug testing case, the Supreme Court did not point to the kind of governmental interest—legitimate—that it found to be sufficient in its earlier checkpoint case. It found a compelling government interest. *Skinner*, 489 U.S. at 628-33, 109 S.Ct. at 1419-22. Oregon would, no doubt, do the same when deciding the case under Article I, Section 9. But left without explicit guidance from the Oregon Courts, we will turn to a Fourth Amendment analysis. That analysis will not only uncover the legal principles, but will also flesh them out by some consideration of the facts of the relevant cases. We will

also consider the private and governmental interests together. While they are separate elements, they are intertwined in any analysis to a very high degree, for they are not separate little weights to be put on a chemist's balance. Rather, different mixtures of the values they represent will yield different results, just as different mixtures of chemicals will yield different reactions.

We start with *Skinner*, where the Court emphasized the need to balance governmental and privacy interests in any Fourth Amendment analysis. *Id.* at 619, 109 S.Ct. at 1414. In *Skinner*, the Court referred to the number of train accidents which had occurred over the last decade and which were drug or alcohol related. *Id.* at 607, 109 S.Ct. at 1408. It went

on to mention the injuries and property loss that had resulted; there had even been 25 fatalities. *Id.* The Court said:

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.

Id. at 624, 109 S.Ct. at 1417.

The Court emphasized that as a general rule "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable...." *Id.* at 617, 109 S.Ct. at 1413. As it said:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a

> function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Id. (quotation and citation omitted.) However, the Court found that in the pervasively regulated railroad industry, the employees' expectations of privacy were diminished. While they might not be exactly minimal, they were at a rather low ebb because the employees in question had been the principal focus of regulatory concern for a very long time. *Id.* at 627-28, 109 S.Ct. at 1418-19.

Against this rather minimal employee interest the Court set what it described as the compelling interest of the government in testing without a showing of individualized suspicion. It explained that determination as follows: "Employees subject to the tests discharge

duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628, 109 S.Ct. at 1419. Given the minimal employee interest and the compelling governmental interest, the Court upheld the drug testing program.

In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), the Court was presented with a somewhat different kind of safety concern. There it dealt with certain groups of employees in the Customs Service. Those were employees who were directly involved in drug interdiction or enforcement, those who carried firearms, and those who handled classified material. The Court determined that testing the first two of

these groups was valid; we will discuss the third later in this opinion.

As to the first two areas of coverage, the Court declared that employees involved in the interdiction of drugs and those who carry firearms have a diminished expectation of privacy because, considering the nature of their duties, they "reasonably should expect effective inquiry into their fitness and probity." *Id*. at 672, 109 S.Ct. at 1394. They should expect that reasonable tests will be applied to them.

To some extent the discussion of their expectations was a reiteration of the governmental interest discussion in which the Court declared that those who interdicted drugs are "our Nation's first line of defense against one of the greatest problems affecting the health

and welfare of our population." *Id*. at 668, 109 S.Ct. at 1392. As such, they are subject to trickery, bribes, temptation, and extreme physical danger. Thus they must be "physically fit, and have unimpeachable integrity and judgment." *Id*. at 670, 109 S.Ct. at 1393. Turning to employees who carry guns, the Court said that those "who may use deadly force 'plainly discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" *Id*. (citation omitted). Given that analysis of interests, the Court, not surprisingly, determined that the suspicionless testing of those employees was proper.

Our cases have approved the expansion of drug testing to still more

employees, but that has always been in the context of truly serious concerns of a safety nature. In *AFGE Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir.1991), for example, we pointed out that people who are required to hold top secret security clearances are in a position to obtain information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national-security." *Id.* at 504 (internal quotation omitted). Those individuals, we said, have positions which subject them to regular close review of their personal lives, as a result of which their expectations of privacy are much attenuated. *Id.* at 507. The compelling nature of the government's interest, on the other hand, is found in the gravity of the risk. It takes no hierophant to

see that the very safety of this country and its citizens can be seriously compromised by a drug-afflicted person with access to top secret materials. *See also Department of the Navy v. Egan*, 484 U.S. 518, 527-28, 108 S.Ct. 818, 824, 98 L.Ed.2d 918 (1988).

Our other cases are to the same effect. *See IBEW, Local 1245 v. United States Nuclear Regulatory Commln*, 966 F.2d 521 (9th Cir.1992) (*IBEW v. NRC*) (diminished expectation of privacy conceded, and the danger of catastrophic harm in a nuclear accident is compelling); *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir.1991) (privacy expectations of truck drivers are markedly reduced, and given the size of commercial trucks and the possible danger

from their loads, the government's interest is compelling); *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir.1990) (the privacy interest of gas pipeline workers is diminished in this regulated industry, and the terrible accidents that can occur show a compelling government interest); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir.1990) (diminished expectation of privacy conceded, and the interest of the government in preventing air crash disasters is compelling), *cert. denied*, 498 U.S. 1083, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991).

The nature of the Fourth Amendment analysis is further illuminated by the Court's comments on those who cannot necessarily be covered by random testing. In *Von Raab*, for example, although the

Court approved testing of front-line and gun-toting workers, it did not as readily accept the notion that for security reasons a compelling government interest justifies the testing of all accountants, animal caretakers, attorneys, baggage clerks, coop students, electrical equipment repairers, mail clerks and messengers in the Customs Department. 489 U.S. at 678, 109 S.Ct. at 1397. The Court returned the case for further findings regarding them. Similarly, in *IBEW v. NRC*, in a concurring opinion joined by two judges of the three-judge panel, we expressed serious doubt that the danger of nuclear accidents justified drug testing of all clerical workers. 966 F.2d at 528-29. *See also Taylor v. O'Grady*, 888 F.2d 1189, 1199 (7th Cir.1989) (while prison employees in

direct contact with prisoners can be tested, other prison personnel cannot be - "generalized interest in the integrity of the work force" is not enough); *Harmon v. Thornburgh*, 278 U.S. App. D.C. 382, 878 F.2d 484, 492-93 (D.C.Cir.1989) (while attorneys with access to top secret information can be tested, other attorneys in the DOJ who merely deal with grand juries and prosecute criminal cases cannot be, as a group), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990).

It can, therefore, be readily seen that although the courts have been willing—perhaps too willing—to allow employee drug testing, they have done so in cases fraught with danger where the interests of the person to be tested were attenuated. We must consider the

efficacy of the Policy with these principles in mind.

As we turn to our analysis we must be ever mindful that "students [do not] shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). School boards have:

> important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

Children *are* compelled to attend school, but nothing suggests that they lose their right to privacy in their excretory functions when they do so. While they must attend classes and follow school rules, that does not indicate they have given up their basic privacy rights. It is true, of course, that after a complete application of the balancing test, the Supreme Court did allow individualized searches of students based upon a somewhat lessened standard of suspicion than that which applies elsewhere. But the Court was careful to say that "the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *T.L.O.*, 469 U.S. at 338, 105 S.Ct. at 741. In fact, the Court suggested, without holding, that a student's

interest in privacy is not of the minimal kind that had been found to justify random searches in the past. *Id.* at 342 n.8, 105 S.Ct. at 743 n.8. There simply is no sufficient basis for saying that the privacy interests of students are much less robust than the interests of people in general.

Nor can we say that the privacy interests of athletes are substantially lower than those of students in general. The District's argument that student-athletes have a reduced expectation of privacy because of their participation in an activity with many rules analogizes to inapposite cases. Training rules and grade point average requirements are not the sort of extensive government regulation that has been found to diminish the expectation of privacy of

workers in high risk industries or high security areas of the government. *See, e.g., IBEW v. NRC*, 966 F.2d at 525 (workers at nuclear power plants); *AFGE*, 944 F.2d at 507 (Navy civilian employees who hold "Top Secret with Access" security clearances); *Bluestein*, 908 F.2d at 456 n.7 (airline workers). High school athletes do not go through extensive background checks in order to join their teams. Nor, in general, do their lives or the lives of others depend upon their ability to perform their roles on the football team. Participation in interscholastic sports does not significantly diminish a high school athlete's reasonable expectation that he will not be compelled to submit to suspicionless drug testing by urinalysis. Appellee's contention that conditions in

the school locker room reduce an athlete's expectation of privacy is similarly unavailing. Normal locker room or rest room activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination.

We recognize that, in some sense, students, participation in athletics is "voluntary." That, too, is insufficient to reduce their privacy interests to a minimal level. Participation in athletics is obviously highly desirable and encouraged, as this record shows. The fact is that parents wish to have their children obtain the physical and mental benefits of organized sports. That, too, is part of the educational process; part of what tax dollars pay for. While separating mind and body

might be a fine idea for scientific purposes, we have learned that they are inextricably intertwined. In a word, what benefits one, benefits the other. Children, students, do not have to surrender their right to privacy in order to secure their right to participate in athletics. Athletes' right to privacy also remains robust.

But the strength of the government's interests must be considered. Those interests themselves are not minimal. The District wishes to prevent unnecessary athletic injuries, to reduce the attraction of drugs among other students, and to improve discipline. Certainly those are worthy goals. However, worthy as they are, they suffer by comparison to the kinds of dangers that have existed when random testing has

been approved. The extreme dangers and hazards involved in the prior cases are simply not present here. The prospect that an athlete might hurt himself or a competitor is real enough, but it is not a risk of the same magnitude as an airplane or train wreck, or a gas pipeline or nuclear power plant disaster. The concern that our children will fail to acquire knowledge or respect is also real enough, but it, too, does not reach the level of the concerns that have permitted suspicionless testing. All of this is true as a general proposition, and nothing in this record shows a situation or problem so exacerbated as to take it beyond the generality.

Having uncaring, disrespectful, drug-impaired children in our schools is tragic. Having them anywhere is equally

tragic. In fact, it is tragic to have adults of that type in our society. It is widely conceded that what drug usage has done to the fabric of our society is a tragedy of national proportions. We do not disagree with that. However, it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless testing. It has been lurking as a background condition for our determinations, but that is all. Its presence has been referred to, but *the* disaster or tragedy has been some additional horrible element, some terrible threat to safety that can flow from the presence of drugs—some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security. The record

shows no such possibility here. Nor does it show that the incremental difficulties involved in athletics elevated the drug danger so far above the norm that the government interest became compelling.

The District has alluded to the possibility that it could incur liability if it knowingly fielded a team of drug-affected students. No doubt it could. We agree that it need not do that, but our concession is a far cry from saying that the District can mandatorily test everyone. Given the standard made possible by *T.L.O.*, the District's argument might well justify individualized testing; on this record, it does not justify random testing.

Thus, when we mix all of the elements together—the slight weight in favor of efficiency, the privacy

interest, the governmental interest, and the discretionary factor—and step back to look at the compound they yield, it becomes apparent that the Policy violates the Fourth Amendment. It follows that it also violates Article I, Section 9 of the Oregon Constitution.

It is important to understand the contours and outer limits of our holding. We do not, as we have already suggested, decide that there could be no appropriate individualized testing program. More than that, we do not say that there could never be a case where a random search would be appropriate in a school setting. *See, e.g., In re Isiah B*, 176 Wis.2d 639, 500 N.W.2d 637 (after a series of shootings on campus, rumors indicated that there would be a shootout on November 19, 1990; a random search of

lockers on that date was upheld), *cert. denied*, — U.S.—, 114 S.Ct. 231, 126 L.Ed.2d 186 (1993). *But see Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D.Tex.1989) (initial and random drug testing of all students who wish to participate in extracurricular activities violates the Fourth Amendment), *aff'd*, 930 F.2d 915 (5th Cir.1991); *Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo.App.1991) (random drug testing of athletes violates Fourth Amendment; governmental interest not compelling) *aff'd*, 863 P.2d 929 (Colo.1993); *Odenheim v. Carlstadt-East Rutherford Regional Sch. Dist.*, 211 N.J.Super. 54, 510 A.2d 709 (Ch.Div.1985) (drug testing of all students violates Fourth Amendment). Moreover, we do not decide whether a program based upon the

truly voluntary consent of individual parents to have their child randomly tested—not, no testing, no playing—would obviate the difficulties we find with the Policy.

Before concluding, we must acknowledge that in *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir.1988), the court upheld a random drug testing program very similar to the one we now review. Perhaps that court found a more compelling set of facts than we discover here, but we are unable to say so after reading the opinion. We believe, instead, that the Seventh Circuit has unduly minimized the privacy interests of students. It has also given undue weight to the governmental interest by focusing on the general problems generated by the drug plague, rather than

upon the question of whether the danger to safety is so high as to be compelling.[3] We could fill more pages reiterating what we have already said, but, in a nutshell, we simply do not agree with the Seventh Circuit.

CONCLUSION

We understand the importance of having drug-free children, and the sorrow our society is reaping from the fact that the drugs which have invaded it have found their way into our children's hands. We also understand the deep concerns of parents, teachers,

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[3] We note that the *Schaill* court balanced the students' privacy interests against the school district's "*substantial* interest in enforcement of its proposed random urinalysis program." 864 F.2d at 1321 (emphasis added). In contrast, subsequent Supreme Court cases have allowed random urinalysis programs only after finding compelling governmental interests that outweigh employees' diminished expectations of privacy. *See Skinner*, 489 U.S. at 626-33, 109 S.Ct. at 1418-21; *Von Raab*, 489 U.S. at 670-77, 109 S.Ct. at 1393-96.

administrators, and school boards. We have no doubt that the District and those associated with it have proceeded in all good faith.

However, we also understand the concern of our forebears and the importance of the protections given by the constitutional provisions which prohibit unreasonable searches and seizures. We are all too aware of the dangers to our liberties that those provisions are designed to protect against and of the constant pressures upon them, despite centuries of living with and under their protections.

We have found that we must live with a certain amount of discomfort, even danger, if we are to maintain constitutional protections. If they are to continue to exist and flourish, we and

our children must understand them, profit from them, and believe in them. They are, after all, just words, ideas, beliefs, and principles. But if we are vigilant there is a great deal of power in the word "just."

Given the Fourth Amendment, given our traditions, given our law, we are constrained to hold that the Policy is invalid under the Fourth Amendment. That being so, Oregon would find it invalid under Article I, Section 9, of its Constitution. As we have already indicated, it would probably do so with less lucubration, and with less spilt ink.

REVERSED and REMANDED

REINHARDT, Circuit Judge concurring:

Although I am in complete agreement with the reasoning and the result in

Judge Fernandez's opinion for the court, I write separately to emphasize that while our opinion holds expressly that Vernonia School District's drug testing policy is violative of Article I, Section 9 of the Oregon Constitution, it also necessarily holds that the policy violates the Fourth Amendment to the United States Constitution. Indeed, the opinion cannot be read otherwise: there is no way to "avoid" a federal constitutional holding in this case, because Article I, Section 9 and the Fourth Amendment are textually identical and are interpreted "coextensively." Moreover, our decision is based almost exclusively on the application of federal law. Under the circumstances, our holding cannot be confined to one of Oregon law.

Generally, federal courts will avoid federal constitutional issues when the alternative ground of decision is one of state statutory or constitutional law. *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir.1991)(state "no [religious] preference" clause, rather than dissimilar religion clauses of First Amendment, held proper ground for decision). Where, however, a question involves identical or "coextensive" state and federal constitutional provisions, a holding based on state constitutional law does not "avoid" answering the federal question as well. As both Oregon law and Judge Fernandez's opinion for the court make clear, Article I, Section 9 and the Fourth Amendment are textually "coextensive" and are interpreted

identically.[1] *See State v. Flores*, 280 Or. 273, 279-81, 570 P.2d 965, 968-69 (1977). ("[T]here is no reason, based on either the text or the history of Article

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[1] The Fourth Amendment reads:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 9 of the Oregon Constitution provides:

> No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

I, Sec. 9, to suppose that that section has a different meaning from the Fourth Amendment."). Therefore, a decision on the meaning of Article I, Section 9 is by necessity also a decision on the meaning of the Fourth Amendment. Any attempt to limit our decision to Article I, Section 9 would be sheer flim-flammery.

We acknowledged this simple fact in *Los Angeles County Bar Ass'n v. Eu*, 979 F.2d 697, 705 n.4 (9th Cir.1992). In *Eu*, we held that the right to access to the courts provided in the California Constitution and the Fourteenth Amendment were coextensive and decided plaintiff's right-to-access claim under the federal provision. The Supreme Court, without any analysis, adopted the same approach in *Wisconsin v. Constantineau*, 400 U.S. 433, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971).

In *Constantineau*, the Court struck down a Wisconsin statute on the basis of federal due process without addressing the dissent's assertion that an identical due process provision of the Wisconsin Constitution was sufficient to dispose of the case.

Interestingly, Chief Justice Lucas of the California Supreme Court has suggested that state courts, when faced with complex and sensitive constitutional questions implicating coextensive state and federal provisions, should defer decision on the state provision in favor of the federal one. *See Sands v. Morongo Unified School Dist.*, 53 Cal.3d 863, 281 Cal.Rptr. 34, 809 P.2d 809 (1991)(en banc)(religious invocation and benedictions at public high school violate coextensive clauses of the

federal and California Constitutions). Such deferral, Justice Lucas explained, would invite early review of the state court's decision by the United States Supreme Court, the "primary interpreter and protector of the guarantees of the Bill of Rights. . . ." *Id.* 281 Cal.Rptr. at 59, 809 P.Ld at 834-835 (Lucas, J., concurring). I point this out because if Justice Lucas is correct, and we were to attempt to base our holding solely on Article I, Section 9, we would be faced with the anomalous situation wherein state courts avoid state constitutional questions but freely reach sensitive federal constitutional questions while federal courts avoid federal constitutional questions in favor of resolution on the basis of coextensive state constitutional provisions. That

would make even less sense than many of the other contortions in which we engage in our continuing effort to avoid doing justice by relying on arcane procedural precepts.

The process is not as simple as Chief Justice Lucas suggests, however. State courts are free to give broader meaning to state constitutional provisions with similar language, so long as they are relying on state law and not just on their interpretations of federal cases. They may give a more expansive protection to individual rights, but not a lesser one. In any event, this is not that type of case. There is as yet no independent Oregon determination of the status of drug testing under Article I, Section 9. Lacking such guidance, we are obliged to refer to federal law,

specifically to federal judicial construction of the Fourth Amendment.

In any event, there are good common sense reasons why we are unable to avoid a federal decision in this case. Even without the guidance of *Eu* and *Constantineau*, it seems likely that the identical plain language of the Fourth Amendment and Article I, Section 9 will result in similar interpretation. It is true that in the future the Oregon courts could choose to interpret Article I, Section 9 to provide more protection than the Fourth Amendment against random, suspicionless drug searches. As stated above, however, there are as yet no Oregon cases that apply Article I, Section 9 to the question of drug testing. Hence, as Judge Fernandez's opinion correctly states, we are unable

to interpret Article I, Section 9 without "a federal compass"; i.e., we have only Fourth Amendment jurisprudence to guide our analysis. Therefore, we first are obliged to clarify the extent of the Fourth Amendment restraint on random drug searches. Toward that end, we determine that the Vernonia School District's random, suspicionless drug testing policy for interscholastic athletes is inconsistent with the Fourth Amendment. Equipped with our "federal compass," we also determine that the policy is inconsistent with Article I, Section 9. As Judge Fernandez's opinion clearly shows, we could not have reached our conclusion regarding Article I, Section 9 without first holding that the school

district's policy violates the Fourth Amendment.

APPENDIX B

United States District Court
for the District of Oregon.

Civ. No. 91-1154-MA.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Plaintiffs,

v.

VERNONIA SCHOOL DISTRICT 47J,

Defendant.

May 7, 1992.

[796 F.Supp. 1354]

OPINION

MARSH, Judge.

Plaintiffs filed this action for declaratory and injunctive relief claiming that the Vernonia School District's drug testing policy violates their son's rights under the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Oregon Constitution.

The following constitutes my findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52.

FACTS

I. *Background*

Vernonia, Oregon, is a small logging community of approximately 3000 persons including all those living within or near the city limits. Plaintiffs Wayne and Judy Acton reside in Vernonia and their son James, age 12, is enrolled in the seventh grade of Washington Grade School. Due to its small size and somewhat remote location, Vernonia is typified by its central interest in school district activities in general and athletics in particular. Witnesses explained that the entertainment opportunities in Vernonia are fairly limited so that interscholastic athletics play a dominant role in the

community and student athletes are well known and admired. Approximately 60-65% of the high school students and 75% of the elementary school students participate in district sponsored athletics.

The school district employs a small but stable and closely knit teaching staff with deep ties to the community. For instance, two of the teachers who testified at trial grew up and attended school in Vernonia. Randall Aultman, the current principal of Washington Grade School, has a long tenure with the district and has held the positions of Assistant Superintendent and principal of the high school. Other teachers who testified had years of experience in the district, and I was impressed by their knowledge and concern for the community, its students and school system.

Aultman and the teachers testified that, up until the early 1980s, discipline at the Vernonia schools was not a problem. The teachers were well acquainted with the students and their families and students were generally cooperative and respectful both in the classrooms and during after-school activities. Drug and alcohol use, although present, was limited to certain small "fringe" elements of the student population. Then, in the mid-to-late 1980s, the staff began noticing a startling and progressive increase in students' use of drugs and alcohol. As the administration became more aware of the problem, it began investigating its possible source. Aultman met with the teaching staff and asked them to look for any signs of drug or alcohol use to gauge the magnitude of

the problem and to try to determine what responsive steps should be taken.

In the meantime the glamorization and use of drugs and alcohol became more blatant. All of the teachers who testified at trial expressed how appalled and helpless they felt as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. Students boasted about drug use and regaled one another with stories of the latest "high" or "party". Class decorum suffered. One teacher, who had never experienced classroom discipline problems in the past, was ready to give up 15 years of service because of her frustration and apparent inability to deal with this new situation. Outbursts of profane language during class, rude and obscene statements directed at other students, and a general

flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day. Organizations formed within the student drug culture taking such names as the "Big Elks" or the "Drug Cartel." Loud "bugling" or "head butting" were the calling cards of these groups. Drug paraphernalia was confiscated on schools grounds, and open use of drugs was observed at a local cafe across the street from the high school.

Drug and alcohol use also invaded the sports program. Students consumed alcohol on a bus after a game. Others stole alcohol from a store after a track meet. Ron Svenson, a teacher and wrestling coach, testified that suspected drug use contributed to the injury of a wrestler who failed to execute a basic

maneuver. When visiting the hotel room of the student the next day the smell of marijuana permeated the area. Svenson also gave convincing testimony that drug use affected certain football players in that they ignored or forgot well-drilled safety routines. He also expressed a concern that the use of intoxicants would slow down their reaction time and hence, make them more susceptible to injury. Svenson's concerns were corroborated by the testimony of Dr. DuPont, who explained the deleterious effects of drugs and alcohol on a person's motivation, memory, judgment, reaction, coordination and performance.

Svenson also explained that a student injured in a regular physical education class is much more apt to disclose an injury than one engaged in interscho-

lastic activity, given the highly competitive atmosphere of the latter. This sense of pride and desire to stay in the game, when coupled with the numbing influence of drugs, became a significant concern to all involved in the athletic program.

School officials had a clear perception that the discipline problems they were experiencing were the result of substance abuse. Informal interviews with responsible students and parents confirmed that fact. Based upon the administration's investigation, it also became clear that the leaders of this activity were also the leading student athletes. Thus, the very center of activity of the school and the community was endangered. Further, the administration was concerned that the corruption of

the school's leading athletes might have a significant poisoning impact upon the broader student population, including the younger and more impressionable elementary school students who would eventually seek to emulate their elders. No evidence was presented that refuted any of the facts set forth nor the conclusions reached by the school officials.

Following its initial investigation, the school administration attempted to address this problem and deter drug and alcohol use through education. Special classes were held on the effect and addictive nature of drugs. Special speakers were invited who the school hoped would have a particular charm with the students. Seminars within classes, polls, and theatrical presentations were all tested and failed to achieve any sig-

nificant impact on the disruptive atmosphere. The day after the presentation of a play directed at the evils of drug use, several sophomore athletes were caught cutting classes to hold a party where arrests took place for the use of intoxicants. The administration even brought in a specially trained dog to sniff for drugs in locker area, but none of these efforts deterred the students. As Dr. DuPont confirmed, youth who use drugs are typically in denial and think they can control their drug use. Thus, simply telling them that drug use is bad for their health and that they should stop using is invariably ineffective. DuPont testified that what youth really need is a compelling reason or incentive to stop using drugs.

The evidence amply demonstrated that

the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary actions had reached "epidemic proportions." The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture. It also became readily apparent to staff that, unless it took immediate action, the problem was going to get far worse and widespread before it got better. At one point, the administration

felt that the only practical solution was mass expulsion. Fortunately for the city of Vernonia, school officials remained vigilant in their efforts and continued to pursue less drastic alternatives.

Spurred on by an article in the local Oregonian, the idea of a drug testing program was considered. While the idea had been discussed before, concerns over its legality had deferred its consideration in favor of exhausting other alternatives. But sometime in 1988, borne out of necessity, the idea was investigated. A study was made of such programs across the country. Legal opinions were studied, legal counsel obtained, and parent meetings were held. Finally, with the blessing of the administration, a unanimous vote of parents at the meeting, and approval of the superintendent a plan was

submitted to the School Board and approved for implementation beginning in the fall of 1989.

II. *Defendant's Drug Testing Policy*

All students who desire to participate in interscholastic athletics are required to sign a form authorizing the District to conduct a test on a urine specimen provided by the student as a prerequisite to participation in the athletic program. The test requirement is applied to all students and is limited to determining whether the student has been using illegal drugs and/or alcohol.

All students in the athletic program are tested at the beginning of each athletic season in which they participate. During the season, student athletes are tested at random on a weekly basis. The

names of all students participating in sports during that season are placed in a "pool" and approximately ten percent of the names are drawn from the "pool" each week. A student draws numbers representing names from the "pool," but is not aware of the names he or she draws. Students whose numbers are drawn are tested one at a time throughout that day.

The procedure for the test varies slightly for boys and girls. Boys begin the process by filling out of a portion of a specimen control form which assigns the student a number. The student is then given a testing packet which contains a cup and a vial. The student enters an empty locker room with a male school official acting as a monitor. The monitor opens the packet and provides the student with the cup. The student then

proceeds to a urinal to produce the sample. While producing the sample. the student remains fully clothed and has his back to the monitor. The monitor is present to assure that there is no tampering and remains 12 to 15 feet behind the student.

After producing the sample, the student returns the cup to the monitor. The monitor checks the sample for temperature and signs of tampering. The monitor then transfers the sample into a vial, and the student places a lid on the vial. The vial is sealed with security tape which the student signs and dates. The vial is assigned a number which coincides with the student's number on the specimen control form and then is placed in a plastic bag which is also sealed and signed and dated by the student. Finally, the stu-

dent completes the specimen control form by verifying that the specimen is his and that the specimen and package were securely sealed in his presence.

The procedure for girls differs only in that a female school official acts as a monitor and the sample is produced in an enclosed stall with a toilet. The monitor remains outside the stall and listens for signs of tampering.

The samples are sent for testing to Metrolab under security procedures designed to protect the chain of possession. Metrolab technicians do not know the identity of the person being tested and rely solely upon the assigned numbers for identification. The test screens for amphetamines, cocaine, marijuana, and alcohol and has an accuracy of approximately 99.94%. Test results are reported by telephone to authorized Vernonia School District personnel. Positive results are also mailed to the district superintendent.

If a student's test is positive, a second test will be administered as soon as possible to confirm the results. Parents will be notified after the second positive test. If the second test is negative, no further action will be tak-

en. If the second test is positive, the school notifies the parents or guardians and conducts a hearing with the student and his or her parents. At this hearing, the student will be given the option of either participating in an assistance program and taking a weekly drug test for six weeks or suspension from the athletic program for the remainder of the current season and the next athletic season. The student will be retested before beginning the next season for which he or she is eligible.

At trial, Aultman testified that, though not spelled out in the written policy, a student athlete who commits a second offense may also continue participating in the athletic program if he or she submits to counseling and weekly urinalysis.

III. *Basis of the Plaintiffs' Claim*

In the Fall of 1991, James Acton, a seventh grade student attending Washington Grade School in the Vernonia School District, signed up to participate in district-sponsored football. To participate in football, James had to take a physical examination.[2] James attended the first football practice and received the District's consent form for drug and alcohol testing. After discussing the form with his parents, they decided not to sign it. James and his parents scheduled a meeting with Aultman.

At the meeting, the Actons explained to Aultman that they objected to the drug testing policy because it required James to submit to a urinalysis in the absence of any evidence that he had used drugs or

[2] The physical examination included giving a urine sample.

alcohol. Aultman informed the Actons that James could not participate in district-sponsored athletics without a signed consent form. The Actons notified the district superintendent, Ellis Mason, of their decision. Mason confirmed that James could not participate in district-sponsored sports without a signed consent form. There is no dispute that the policy was applied to James in the same manner as it was applied to all other students who sought to participate in interscholastic athletics and was not based upon any individualized suspicion that James had used drugs or alcohol.

DISCUSSION

I. *The Fourth Amendment*[3]

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The collection and testing of urine constitutes a "search" within the meaning of the Fourth Amendment. *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). The urinalysis test is a

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[3] It is undisputed that defendant's drug testing program constitutes a "state action" for the purposes of establishing the threshold constitutional inquiry. *See e.g. Brooks v. East Chambers Consol. Ind. School Dist.*, 730 F.Supp. 759, 762-3 (S.D.Tex.1989) *aff'd* 930 F.2d 915 (5th Cir.1991).

"search," regardless of whether the act of urination is observed, because the test necessarily discloses facts about which an ordinary citizen has a reasonable expectation of privacy. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175-6 (5th Cir.1987) *aff'd* 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Procedures for collecting urine samples necessarily invade a personal function "traditionally shielded by great privacy." *Id.*, 109 S.Ct. at 1418. The Fourth Amendment applies to government searches undertaken for a purpose other than criminal law enforcement. *See e.g. National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1390 (urinalysis testing of customs service employees who face potential of dismissal must satisfy Fourth Amendment reasonableness require-

ment).

In the criminal context, the Fourth Amendment dictates that searches conducted without a warrant are *per se* unreasonable, subject to a few well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). The "essential purpose" of a warrant is to protect citizens' privacy interests and assure that any searches or seizures are "not the random or arbitrary acts of government agents." *Skinner*, 109 S.Ct. at 1415; *see also Delaware v. Prouse*, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 1396-97, 59 L.Ed.2d 660 (1979) (proscriptions of Fourth Amendment designed to avoid the 'grave danger' of abuse of official dis-

cretion).[4]

The application of the Fourth Amendment to a civil administrative context is a relatively recent development in the law. The majority of the cases that have addressed this issue have done so in the employment context. For example, in *Skinner*, railroad employees challenged several provisions of the Federal Railroad Administration's regulations which required railroads to conduct urine, blood and breath tests following accidents or violations of certain safety rules to assist in its investigation and

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[4] In *Prouse*, the Court held that random automobile "safety checks" conducted by police officers without the benefit of any objective criteria to guide their discretion were unconstitutional. The Court noted however, that its holding "does not preclude ... states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative." 440 U.S. at 664, 99 S.Ct. at 1401.

to take whatever remedial actions were necessary against employees. Positive tests could result in administrative discipline, including dismissal, but would not subject an employee to criminal prosecution. The Court noted that, given the factual context, "a warrant would do little to further these [governmental] aims." *Id.*, 109 S.Ct. at 1415. Further, the Court explained that although some "quantum" of individualized suspicion would "usually" be required in the absence of probable cause, that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.*, at 1417.

The Court analyzed the challenged regulations by balancing the interests sought to be achieved by the government

against the intrusion upon the employees' privacy to determine if the challenged tests were "reasonable." *Id.*, at 1421-1422; *see also Von Raab*, 109 S.Ct. at 1392 (applying *Skinner* balancing test to urinalysis tests of applicants for customs officials promotions). The Court found that the employees had a diminished expectation of privacy since they worked in a highly safety oriented industry which was already subject to significant regulation. *Id.*, 109 S.Ct. at 1417; *see also Von Raab*, 109 S.Ct. at 1392 (diminished expectation of privacy due to exposure to controlled substances); *IBEW Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir.1990) (upholding constitutionality of testing employees who work on natural gas and hazardous liquid pipelines); and *Bluestein v. Skinner*, 908 F.2d 451 (9th

Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991) (upholding random urinalysis testing of airline personnel with safety responsibilities). The Court concluded that the government's "compelling" interests in railway safety outweighed the employees' privacy concerns. *Skinner*, 109 S.Ct. at 1421; *see also Von Raab*, 109 S.Ct. at 1396.[5]

Thus, although not expressly doing so, the Supreme Court appears to have abandoned the Fourth Amendment *"per se"* analysis utilized in criminal law in favor of a "balancing" test in which the government, in the absence of individual-

[5] In *Von Raab*, the Court specifically rejected the employees' contention that the program was invalid because there were so few positive results (approximately five tested positive out of 3600 tested) in light of the significant deterrent effect the tests would have on employees both on and off duty. *Id.*, 109 S.Ct. at 1394-5.

ized suspicion or probable cause, must demonstrate a "compelling need" for the invasion which outweighs the individuals interest in privacy.[6] The Supreme Court's decisions in *Skinner* and *Von Raab*, and the Ninth Circuit's decisions in *IBEW* and *Bluestein*, demonstrate that the government may show a "compelling need" which obviates the need for either a warrant or individualized suspicion if security or safety interests are implicated.

Although the types and magnitude of safety and security concerns addressed in *Skinner* and *Von Raab* differ from those

[6] This is not meant to imply that there exists a separate and distinct "administrative" search doctrine. *See Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1316, n. 7, *reh'g denied* (7th Cir.1988) (discussing debate surrounding 'administrative search' doctrine). Instead, as discussed more fully *infra*, I find that the existence (or absence) of criminal penalties is but one factor which I must consider in determining the weight of individual privacy interests.

faced by students, teachers and coaches who participate in middle and high school athletic programs, courts have acknowledged that the public school is a unique setting in which the constraints of the Fourth Amendment are "relaxed." In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733 83 L.Ed.2d 720 (1985), a 14 year old student who was discovered smoking in the lavatory was taken to the assistant vice principal's office. Upon hearing the report, the assistant vice principal searched the student's purse for cigarettes. During the search, he discovered rolling papers, marijuana, a pipe, a fairly substantial amount of money and possible records of drug sales to other students. Thereafter, the state brought delinquency charges against the student and the admissibility of the items seized

by the vice-principal was ultimately appealed to the Supreme Court. The Court held that the Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials, but that the school setting requires some "easing" of the restrictions to enable school administrators to preserve order and maintain an adequate educational environment. *Id.*, at 334, 340-41, 105 S.Ct. at 738, 742-43. Thus, although student athletes who use drugs do not pose the magnitude of a threat to society that, say, an intoxicated air traffic controller might, the fact that the searches take place within the school setting, as part of a program designed to maintain discipline, enforce athletic program regulations, and protect the safety of student athletes,

is a significant factor that must weigh heavily in any balancing process.

Further, relying upon the "fundamental command" of the Fourth Amendment that all searches be "reasonable," the Court in *T.L.O.* held:

> "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception ... second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place."

Id., at 341-42, 105 S.Ct. at 742-43 (citations omitted). In a footnote, the Court pointed out that it was not confronted with the issue of whether individualized suspicion was an essential element of the reasonableness standard.

Id., at 343 n. 8, 105 S.Ct. at 743 n. 8. However, the Court emphasized that the "Fourth Amendment imposes no irreducible requirement of such [individualized] suspicion." *Id.* Thus, although the context of the *T.L.O.* case involved the search of an individual student, the Court expressly held that "any search" of a student be measured by "reasonableness" based upon the totality of the circumstances and balancing of relative interests.

Whether and how the "reasonableness" analysis and rationale supporting the decisions in *Skinner, Von Raab*, and *T.L.O.* may be extended to an athletic program under guidelines adopted by a school board is a question that has yet to be directly addressed by either the Supreme Court or the Ninth Circuit. However, several other courts have confront-

ed the issue. In *Schaill v. Tippecanoe County School District*, 864 F.2d 1309 (7th Cir.1988) *reh'g denied* (1989)[7], several students challenged the constitutionality of the school system's program for random urine testing for interscholastic athletes. Under the program, all students desiring to participate in interscholastic athletics and their parents had to agree to submit to random urinalysis testing. A positive test would result in suspension from participation in all or a portion of the athletic season unless the student agreed to participate in a drug treatment program. In light of the Supreme Court's holding in *T.L.O.*, the court began its inquiry by noting that the probable cause and warrant re-

[7] Although *Tippecanoe* was ultimately published in 1989, it predates the Supreme Court's decisions in *Skinner* and *Von Raab*.

quirements were not applicable to the program. Instead, the court found that the test should be under the "general Fourth Amendment standard of reasonableness." *Id.*, at 1315. However, because the program was premised upon a lack of *any* individualized suspicion, the court found that the school district bore a "heavier burden" to justify its contemplated actions. *Id.; compare Brooks*, 730 F.Supp. at 764 (search of students must be based upon individualized suspicion absent "extraordinary" circumstances). Although the court did not quantify *how* heavy that burden should be, I find that the analysis presaged the Supreme Court's "compelling need" standard in *Skinner* and *Von Raab*. Accordingly, the court balanced the privacy interests of the students against the government's objectives

and the nature and degree of the intrusion. Factors which the court found weighed in favor of the program's reasonableness included: first, the random nature of the testing which necessarily limited official discretion; second, the limited non-punitive purposes for the search; third, evidence to support a finding that the use of drugs posed a "particular threat" to athletes; fourth, evidence of at least three student injuries that had been caused or exacerbated by drug impairment; fifth, substantial evidence that alternatives methods of investigation would not adequately serve the school's goals; sixth, the diminished expectations that student athletes enjoy by the public nature of the events and by the existence of other regulations and restrictions; and seventh, the incorporation of adequate privacy safeguards such as the strict limits on disclosure of test results and the lack of direct visual observation during the testing procedures.

In *Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo.App.1991), students challenged a drug testing program for intercollegiate athletics at the University of Colorado. In that program, a student was randomly selected for a rapid eye movement test which, if found positive, would lead to a urinalysis test. The court held that the University's interest in securing a drug free athletic program was not compelling and held that the testing procedures violated the Fourth Amendment of the U.S. Constitution. The court enjoined the University from continuing the testing procedures in

the absence of reasonable suspicion to believe that an athlete was using drugs. The court specifically noted that there was no evidence in the record to indicate that student athletes used drugs more than other persons of similar age among the general population and no evidence of actual drug problems or drug related injuries among University athletes. *See also Hill v. NCAA*, 7 Cal.App.4th 1738, 273 Cal.Rptr. 402, *petition for review granted* 276 Cal.Rptr. 319, 801 P.2d 1070 (1990) (college drug testing program invalid under California constitution given lack of evidence to show utility of program outweighed students' privacy rights); and *Brooks*, 730 F.Supp. 759, 764-65 (urinalysis of all students participating in all extracurricular activities unconstitutional given laxity in

testing procedures and lack of any evidence to show connection between drug use, participation in extra-curricular activities and injuries sought to be avoided); and *Anable v. Ford*, 653 F.Supp. 22, 40-41, *modified in part* 663 F.Supp. 149 (W.D.Ark.1985) (finding urinalysis of individual students suspected of marijuana use unconstitutional given unreliable test results and insufficient evidence to justify intrusive procedures utilized).

Based upon the guidance provided by these cases, I find that I must determine whether defendant's urinalysis testing program is "reasonable" in light of all of the justifications underlying the institution of the program and the circumstances surrounding its administration. To assess the "reasonableness" of the program, I find that I must engage in a

balancing test. Because defendant stipulates that it had no individualized suspicion that James had ever used drugs or alcohol, I find that the school district must demonstrate a "compelling need" for the program. Although it is impossible to define the term "compelling need" with any degree of specificity, I find that the cases discussed, *supra*, are instructive and provide an adequate "spectrum" by which I may measure the testing procedures and justification put forth in this case. The Supreme Court, in *Skinner* and *Von Raab*, teaches that a search may be "reasonable" in the absence of a search warrant or individualized suspicion where the safety and security interests of the public significantly outweigh the privacy interests of certain employees who work in industries that carry a high risk of

serious accidents or who are exposed to illegal substances. *Brooks, Hill and Derdeyn* teach that a school may not justify a random urinalysis program upon amorphous statistics or generalized notions about the national drug problem. Finally, the Seventh Circuit Court of Appeals, in *Tippecanoe*, teaches that a schools random urinalysis program for interscholastic athletes which employs the least intrusive means possible to effectuate this goal may withstand constitutional scrutiny if based upon specific evidence of drug related injuries and disciplinary concerns.

In considering all of the evidence produced in this case, I find that there are several factors which weigh in favor of the district's drug testing policy. First, and foremost, there is evi-

dence in the record of specific instances in which coaches have observed athletes perform poorly and unsafely while under the influence of some intoxicant. On one occasion, a wrestler was seriously injured and subsequently observed to smell of marijuana.

Next, there is evidence to show that athletes at Vernonia, perhaps more because of its rural setting, are role models for the entire community. The "Big Elks," the "Drug Cartel" or their successors are clearly leaders for other students and if they are deterred from drug use by threat of suspension from the athletic program, then it is reasonable for school administrators to believe that other students will also be deterred. The testimony of Dr. DuPont was particularly persuasive on the significant de-

terrent effects that a random drug testing program can have on a youthful population.

Further, the affected activity is limited in scope and narrowly tailored to effectuate the district's objectives. Unlike the policy challenged in *Brooks*, which applied random drug testing to all extra-curricular activities, the Vernonia policy is limited to the one activity which, in that community, is likely to have the greatest impact on the drug and alcohol abuse problem given the documented evidence of incidents involving particular students. The regulations already require that students undergo a physical examination prior to participation, the locker rooms themselves are open spaces and do not provide a great deal of privacy when students shower and

change. Thus, drug testing is but one part of a substantial number of other rules and regulations governing athletes.

In addition, the middle to high school setting itself tends to favor the administration's policy given the stated goals and the deference that courts should accord school administrators in matters concerning discipline and maintaining order. I am satisfied by the evidence that defendant did not institute this policy to engage in a "fishing expedition" for drug and alcohol use to carry on a moral crusade. Rather, I find that defendant demonstrated that its concerns were for the limited purposes of addressing student safety in athletic programs and, ultimately, maintaining discipline

in the classrooms.[8] As defendant acknowledges, the school plays a significant role in the development of its students and as such, owes a duty to take such steps as are reasonable and necessary to protect students from harm. Although it is purely speculative, I cannot help but wonder what liability defendant might have faced had it failed to take the next step in combatting the drug and alcohol problem when confronted with such clear evidence that students were abusing drugs and alcohol and engaging in sports.

Also significant is the fact that

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[8] I also note that while I find the *Derdeyn* and *Hill* cases helpful to my analysis of the law to apply, those cases involve college students who have, for the most part, reached the age of adulthood. University programs are far less structured, class attendance is voluntary and discipline is largely left to the students. I also note that the role of an athletic program on a large University is far different than that of a rural middle school or high school with limited alternative activities.

the school district considered and actually tried several alternative methods of dealing with the increase in drug and alcohol related disciplinary problems prior to instituting the drug testing program. As I noted earlier, the school instituted several educational programs designed to discourage drug use and found that the "subtle" approach not only failed, but seemed to cause further disruptions. Less intrusive "screening" methods have proven to be ineffective. As Dr. DuPont explained, visual observations (even by professionals) are simply not reliable indicators of whether that student may have consumed alcohol or drugs. DuPont testified that, although some people display outward manifestations of drug or alcohol use, many others do not, making application of the reason-

able and individualized suspicion standard an unreliable and impractical tool to aid in preventing accidents before they happen. Thus, random drug urinalysis testing was seen as the next logical step in a progressive attempt to address the drug and alcohol problems.

I further find that defendant has taken significant steps to limit the extent of the intrusion. Students at Vernonia, like the employees subject to testing in *Skinner* and *Von Raab*, may produce the sample without a direct eye witness. Test results remain confidential and may only be used to suspend the student from participation in the athletic program—test results are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expul-

sions. The scope of the test is limited to the detection of illegal drugs and alcohol, thus ensuring that prescription drugs or contraceptive use will remain undisclosed. The testing procedures used, unlike those in *Anable*, are highly effective and have an accuracy of 99.94%.

Finally, the program limits the degree of discretion that may be exercised by coaches and school administrators. Testing during the season is random and thus, does not implicate the kind of unfettered discretion which raised the constitutional concerns surrounding automobile "safety checks" in *Delaware v. Prouse*.

When I balance all of the factors present in this case against James' legitimate expectations of privacy, I find that his privacy interests must give way

to the district's need to maintain order and protect its students from injury by use of the least intrusive means available to it. Although I recognize that the program caters to the lowest common denominator and that students who have never consumed alcohol or drugs may suffer a degree of embarrassment, I feel that defendant has come forward with sufficient evidence to show that its drug testing program serves a "compelling need." I emphasize that my holding today is limited to the unique circumstances which confronted the Vernonia School staff. Defendant has proven, beyond all possible doubt, that it was faced with a crisis situation in attempting to maintain order and discipline. Based upon the observations of teachers and coaches, the district came to the inescapable con-

clusion that their problems were directly related to the students' unlawful use of alcohol and drugs. Further, the district's decision to target its athletic program for regulation given the predominant role that athletics play in this small rural community demonstrates that defendant made every effort to tailor this program to the least intrusive extent possible. Thus, whether a similar program could withstand constitutional scrutiny in large metropolitan schools or in other small rural schools will necessarily depend, at a minimum, upon evidence of drug related problems, attempts to address the problems in less intrusive ways, and establishing a connection between the stated objectives and the means

chosen to achieve those objectives.[9]

Based on the foregoing, I find that defendant's drug testing program was justified at its inception and is reasonably related in, scope to the circumstances that exist in Vernonia. Accordingly, plaintiffs have failed to demonstrate that the defendant's drug testing program unconstitutionally interferes with their son's right to be free from unreasonable searches or seizures under the Fourth Amendment.

II. *The Oregon Constitution, Article I § 9*

Article I § 9 of the Oregon Constitution provides:

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[9] For example, Vernonia's drug program might not be "reasonable" as applied to a large metropolitan high school where the students who engage in drug use may neither participate in, nor have contact with students who participate in interscholastic athletics.

> "No law shall violate the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable case [sic], supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

In *State v. Owens*, 302 Or. 196, 206, 729 P.2d 524 (1986), the court stated that Article I, section 9 protects privacy interests, and that a "search" for constitutional purposes occurs when a person's privacy interests are invaded. The Oregon Supreme Court has interpreted Article I, section 9 independently, but parallel to federal court interpretations of the Fourth Amendment. *State v. Brown*, 301 Or. 268, 273, 721 P.2d 1357 (1986).

Oregon courts have not directly addressed administrative, non-criminal, suspicionless searches of the type pre-

sented by a school's random drug testing program.[10] However, in *State v. Tourtillott*, 289 Or. 845, 618 P.2d 423 (1980) *cert. denied*, 451 U.S. 972, 101 S.Ct. 2051, 68 L.Ed.2d 352 (1981), the court addressed the constitutionality of game checkpoint stops.[11] During one of

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[10] Prior to 1980, the Court of Appeals examined and upheld the validity of administrative, non-criminal searches in four cases and treated the requirements of Oregon and federal search and seizure law as interchangeable. *See* the Discussion in 46 Op.Atty.Gen. ____ (No. 8191, Nov. 16, 1987) (Slip op. at 25), *citing Eddie's Supper Club v. OLCC*, 23 Or.App. 493, 543 P.2d 19 (1975) (OLCC searches of licensed premises without warrants or individualized suspicion); *State ex rel. Accident Prev. Div. v. Foster*, 31 Or.App. 291, 570 P.2d 398 (1977) (statute allowing warrant to search business premises for safety violations may issue without individualized probable cause); *State v. Westside Fish Co.*, 31 Or.App. 299, 570 P.2d 401 (1977) (warrantless search of food processing plant by Fish and Game Commission); and *Accident Prevention Division v. Hogan*, 37 Or.App. 251, 586 P.2d 1132 (1978) (warrant issued without probable cause to determine compliance with safety regulation).

[11] The roadblocks were manned by officers of the Oregon State Police Game Division and were set up to check hunters' compliance with the game laws, to check hunting licenses and to gather statistics on hunter success on the opening day of deer hunting season. *Tourtillott*, 289 Or. at

these checkpoint stops, Ms. Tourtillott was arrested for driving with a revoked license and was ultimately sentenced to imprisonment for one year. There was no dispute that the officers had neither probable cause nor reasonable suspicion to believe that the defendant had been involved in criminal activity at the time she was stopped. On appeal, the defendant argued that the stop violated Article I § 9 of the Oregon Constitution and the Fourth Amendment of the U.S. Constitution because the stop was not based upon reasonable suspicion. The court rejected the contention that reasonable or individualized suspicion was a necessary requisite for a valid stop. Instead, the court followed the reasoning from United States Supreme Court cases

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848, 618 P.2d 423.

which upheld the constitutional validity of border searches and highway safety checks. *Id.*, 289 Or. at 854-857, 618 P.2d 423. Like the federal decisions, the Oregon court held that to determine the reasonableness of the checkpoint stop procedures, it must balance the government's interest in the promotion of legitimate interests against the defendant's right to be free from unreasonable seizures. *Id.*, at 857-859, 618 P.2d 423. The Oregon court enunciated the following four factors which it considered particularly significant in determining the constitutionality of a particular government procedure:

(1) the importance of the governmental interest at stake;

(2) the psychologically and physically intrusive nature of the procedure;

(3) the efficiency of the procedure

in reaching its desired goals; and

(4) the degree of discretion the procedure vests in the particular officers.

Id., at 864, 618 P.2d 423. Although the court ultimately held that the game checkpoint was lawful, it emphasized that its holding was limited to determining the constitutionality of a stop, not a search. *Id.*, at 861, 618 P.2d 423. The dissent criticized the majority for its reliance upon Supreme Court decisions which involved administrative searches:

> "I believe the majority errs in transferring that evaluation [of the degree of official discretion] from the context in which the Supreme Court developed it—the context of inspections for preventative or corrective purposes—to the different and wider context of seizures aiming at the discovery and punishment of past offenses."

Id., at 873, 618 P.2d 423, Linde, J. dissenting.

Thereafter, in *Nelson v. Lane County*, 304 Or. 97, 743 P,2d 692 (1987), the court considered an appeal from a civil judgment in which the plaintiff sought civil remedies against three Oregon state police officers who stopped and detained her at a sobriety roadblock. On appeal, the state argued that the roadblock was justified under the reasoning in *Tourtillott* and as an administrative search. *Compare State v. Anderson*, 304 Or. 139, 743 P.2d 715 (1987) and *State v. Boyanovsky*, 304 Or. 131, 743 P.2d 711 (1987) (roadblocks designed to gather evidence for criminal prosecution of drunk drivers rather than administrative enforcement unconstitutional absent individualized suspicion). The three-justice plurality did not reach the issue of the

constitutionality of the roadblock, but instead decided the case on statutory grounds, ruling that, unlike the game regulations which authorized the checkpoint in *Tourtillott*, there was no express legislative authorization to conduct the sobriety checkpoints. The court's holding appeared to be an outgrowth of the "unconstrained exercise of discretion" concern voiced by the Supreme Court in *Delaware v. Prouse*. Although the roadblock stops were not the product of a decision made by a single officer out in the field as in *Prouse*, the roadblocks were developed as part of the Oregon State Police Patrol Technique Manual—a group which is not "politically accountable," or specifically authorized by a politically accountable body to conduct such inspections. *Id.*, 304 Or. at

105, 743 P.2d 692. In *dictum*, the plurality suggested that sobriety checkpoints might be lawful if properly authorized and "providing sufficient indications of the purposes and limits of executive authority, and if carried out pursuant to a properly authorized administrative program designed and systematically administered to control the discretion of non-supervisory officers." *Id.*, at 104, 743 P.2d 692, citing *State v. Atkinson*, 298 Or. 1, 9-10, 688 P.2d 832 (1984).[12] Two dissenting justices argued that the majority had failed to adequately consider the state's interest in protecting its citizens from harm suffered

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[12] In *Atkinson*, the court held that warrantless, suspicionless non-criminal "inventory" searches of lawfully impounded cars were permissible under Article I § 9 if properly authorized and administered in a systematic, non-discretionary fashion. *Id.*, 298 Or. at 10, 688 P.2d 832.

by intoxicated drivers and would apply the four-part test of *Tourtillott*. *Id.*, 304 Or. at 115-119, 743 P.2d 692, Peterson, C.J. dissenting.

Although Oregon courts have not directly addressed the issues in this case or the legal standards to be applied to administrative searches under Article I § 9 of the Oregon Constitution, I find that the Supreme Court's decisions in *Tourtillott* and *Nelson* provide me with sufficient guidance to determine the validity of the challenged drug testing program in this case. This finding is influenced, to a large extent, by the parties' stipulation that jurisdiction is proper in this court. I agree with counsel that remanding the state constitutional challenge to the state court at this stage in the proceedings would not

serve the interests of judicial economy, efficiency or be required in the interests of comity. *Compare Castellano v. Board of Trustees*, 937 F.2d 752, 758 (2nd Cir.), *cert. denied* — U.S —, 112 S.Ct. 378, 116 L.Ed.2d 329 (1991) (holding court 'should' dismiss supplemental state constitutional claim in interest of comity).

In light of *Nelson*, I find that I must first determine whether the drug testing procedures in this case were properly "authorized." Under the Oregon statutes, school districts are considered "corporate bodies." O.R.S. 332.072. School boards in each district are expressly authorized to "transact all business coming within the jurisdiction of the district and to sue and be sued." *Id.* Further, school boards are charged

with responsibility "for educating children residing in the district" which includes determining "what things are detrimental to the successful management, good order and discipline of the schools and the rules required to produce these conditions." *Id.*; and *Burkitt et al. v. School District No. 1, et al.*, 195 Or. 471, 492, 246 P.2d 566 (1952) (citations omitted). This grant of authority expressly includes the power to develop a drug abuse program as provided by O.R.S. 336.222:

> "In accordance with rules adopted by the State Board of Education . . . each district school board shall adopt a comprehensive drug abuse policy and implementation plan including, but not limited to . . . alcohol and drug abuse preventions curriculum and public information programs . . ."

Unlike the Oregon State police department, which is an executive agency,

the Vernonia School Board is a politically accountable body. Each board member is elected by the voters in the District area. Each is subject to recall and must face re-election. Thus, voters who oppose the policy may lobby the board and voice their objections through the electoral process.

Based on the foregoing, I find that the challenged drug testing program is authorized by Oregon statutes and was properly promulgated and implemented by the Vernonia School District.

As a preliminary matter, I note that the Oregon Supreme court has not directly addressed the issue of whether a urinalysis test is a "search." However, Oregon courts have held that a "search" occurs when a person's privacy interests are invaded. *Owens*, 302 Or. at 206, 729 P.2d

524. In *State v. Milligan*, 304 Or. 659, 748 P.2d 130 (1988), the court held that compelled extraction of blood constitutes a search under Article I § 9. I find that a urinalysis test is a "search" under Article I § 9 of the Oregon constitution. Having determined that the drug policy is properly "authorized" pursuant to Oregon law and that the urinalysis test is a "search," I now turn to the issue of whether the program is valid under Article I § 9 of the Oregon Constitution. Based upon the court's holding in *Tourtillott*, I find that the relevant inquiry is whether the program is "reasonable." The "reasonableness" of the program must be determined by balancing the school district's asserted interests against the plaintiffs' right to be free from unreasonable intrusions into his

privacy. In conducting this balancing test, I shall consider each of the four factors articulated by the court.

The first factor is the importance of the governmental interest at stake. 289 Or. at 864, 618 P.2d 423. In this case, the school district's interest in preventing and deterring drug and alcohol abuse among the student population is highly significant. As I noted previously, there is ample evidence in the record to support the district's claim that alcohol and drug use were the primary causes of disruptions and disciplinary problems during school hours. Further, there is evidence which tends to show that alcohol and drug use contributed to an athlete's injury and/or would eventually lead to additional injuries.

The second factor is the psychologi-

cally and physically intrusive nature of the procedure. *Id.* Again, as discussed in greater detail *infra*, I find that the district program uses the least intrusive method possible by insuring the confidentiality of the test results and by permitting students to produce the sample without direct witness observation. Most significantly however, is the fact that the search program was instituted to correct behavior and deter future unlawful conduct—it was not designed to punish the students for past conduct and does not expose the students to possible criminal sanctions or investigation.

The third factor, the efficiency of the procedure in reaching the desired goals, is best demonstrated by the results actually achieved in this case. Disciplinary reports are back down to

"normal" levels and there have been no subsequent reports of athletic injuries attributable to drug or alcohol use. As the school officials testified, the program runs smoothly and causes no disruptions to either the school or athletic program.

The final factor, the degree of discretion left to individual officers, is not implicated by the program at all since testing is required of all applicants and then conducted on a random, lottery-type basis during the course of the season.

When I consider all of these factors in light of the unique circumstances present in the Vernonia School district, I find that the balance of interests weighs heavily in favor of the government's interests in maintaining a

healthy and productive scholastic atmosphere. Accordingly, I find that the challenged program is "reasonable" under Article I § 9 of the Oregon Constitution.

CONCLUSION

Based on the foregoing, I find that defendant's drug testing program is reasonable under the Fourth Amendment of the United States Constitution and Article I § 9 of the Oregon Constitution. Accordingly, plaintiffs' claims for injunctive and declaratory relief are denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-35520

D.C. No. CV-91-1154-MFM

ORDER

WAYNE ACTON and JUDY ACTON, guardians ad litem for JAMES ACTON,
Plaintiffs-Appellant,

v.

VERNONIA SCHOOL DISTRICT 47J,
Defendant-Appellee.

Before: REINHARDT, BRUNETTI, and FERNANDEZ, Circuit Judges

The panel has unanimously voted to deny the appellee's petition for rehearing. The suggestion for rehearing en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

FILED: July 8, 1994.

Supreme Court, U.S.
FILED
OCT 31 1994
OFFICE OF THE CLERK

No. 94-590

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for James Acton,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does petitioner's drug testing program constitute an unreasonable search under Article I, section 9, of the Oregon Constitution?

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I.

OPINIONS BELOW

Respondents Wayne and Judy Acton (the Actons), guardians ad litem for their son, James Acton, 12, brought this action to enjoin petitioner Vernonia School District 47J (the District) from enforcing a random drug testing program for student athletes. They alleged that the program offends Article I, section 9, of the Oregon Constitution, as well as the Fourth Amendment to the United States Constitution, both of which prohibit "unreasonable searches." The District Court found no violation of either constitution and entered judgment against the Actons. *Acton v. Vernonia School*

District 47J, 796 F.Supp. 1354 (D. Or. 1992) (Pet. App. B at 76a). They appealed, and the Court of Appeals reversed. *Acton v. Vernonia School District 47J*, 23 F.3d 1514 (9th Cir. 1994) (Pet. App. A at 1a). The appeals court ruled for the Actons on their state claim and, therefore, found it unnecessary decide their federal claim. *Id.* at 1518 (Pet. App. A. at 16a) ("We are therefore constrained, in the first instance, to decide this case on Oregon constitutional grounds.").

II.

JURISDICTION

The petition for writ of certiorari was filed on September 28, 1994, within 90 days of the denial of the District's timely petition for rehearing (July 8,

1994). (Pet. App. C at 143a). This court has jurisdiction under 28 U.S.C. 1254(1).

III.

PERTINENT CONSTITUTIONAL PROVISIONS

Article I, section 9, of the Oregon Constitution reads:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

The Fourth Amendment to the United States Constitution reads:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched,

and the persons or things to be seized."

IV.

STATEMENT OF THE CASE

The District's statement of the case contains several misstatements, which, as explained later, may bear on what issues would be before the Court if it grants certiorari. The Actons bring them to the Court's attention pursuant to Rule 15.1.[1]

First Misstatement: *There was an "epidemic of drug use" among the District's students before the drug testing policy.* (Pet. at 3).

[1] Curiously, most of the "facts" in the District's statement of the case are drawn not from the evidence but rather from the District Court's opinion, which the Court of Appeals overturned. Pet. at 4 n. 1. As discussed more fully below, there is little or no evidence to support the District Court's findings about drug use by District students.

In fact, the record contains little or no evidence that any students were using drugs. What it contains is mostly complaints by some teachers about a perceived decline in student deportment before the policy was adopted. Students, the teachers said, were becoming increasingly unruly, disruptive, and insubordinate in the classroom, leading to a perceived (but never proven) rise in the number of students that teachers sent to administrators to be disciplined for misbehaving, commonly known as "disciplinary referrals." For want of some other explanation for the change in student conduct, the teachers assumed that the unruly students must be on drugs. This assumption was supported, in the teachers' minds, by unconfirmed, second-hand reports of off-campus drug

use, almost all of it hearsay or hearsay within hearsay,[2] and by reports of students romanticizing drugs in papers and hallway conversations.[3]

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[2] For example, the school principal testified: "Four football players talked to the football coach and admitted that they have used drugs, and amphetamines were those drugs, and the coach told me[.] [T]he kids never came forward and said, you know, they did. . . ." Tr. 24. In other words, four students told the football coach that they had used amphetamines. The coach told principal what he had heard, and the principal repeated it at trial. Later, the principal admitted that he had never actually caught a student taking drugs and that he was acting solely on hearsay reports. Tr. 57.

The wrestling coach also testified: "When I was an assistant coach the head football coach was called in and I believe it was in the football season of '85 and apprised of the fact that parents called and said that some of their sons -- that other kids on the team had done drugs on a road trip. . . ." Tr. 104. Translated, what the wrestling coach said is that the football coach told him that some parents told the football coach that some students told the parents that some other students had taken drugs during a road trip.

The district court recognized that the District's case was built on hearsay, Tr. 143-44, and allowed the Actons a continuing objection on that grounds. Tr. 24. The court also said, twice, that it would not rely on hearsay to find that students were actually taking drugs, Tr. 25, 116-17, but eventually it did just that.

[3] A teacher who taught composition to 90 or so students each year for 13 years testified that 8 or 9 of them -- which works out to less than one percent of all of her students -- had written papers that romanticized drugs. Tr. 88, 91, 98. There is no evidence that any of those students, or others who were overheard in the hallway bragging about drug use, actually took drugs, or that this was anything but juvenile bravado.

Some teachers testified that an unspecified group of students took to calling themselves the "Big Elks," for some unknown reason. Tr. 68-69, 81, 128-31. They went around the school "bugling" and butting their heads together, again for unknown reasons. Tr. 91. Another group called itself the "Drug Cartel" and did equally strange things. Tr. 91. As usual, school officials assumed that all strange behavior must be drug-induced, not simply juvenile, and thus concluded that these two cliques were part of some underground drug culture. Pet. at 7 n. 4. There is no evidence, however, that any "Elk" or "Cartellian" actually took drugs.

Clearly, the teachers *thought* they had a drug "problem," which, of course, is a "matter of perception or definition," as the Court of Appeals noted. 23 F.3d at 1519 (Pet. App. A at 20a). But they never came close to proving that they actually *had* a drug problem, certainly not one of "epidemic" proportions, as the District suggests in its petition.

Second Misstatement: *Drug use "invaded the [District's] sports*

program," endangering the athletes. (Pet. 7).

If there is little evidence of drug use in the classroom, there is no evidence of drug use in the sports program. Indeed, the District conceded, in a pre-trial interrogatory, *that it was unable to confirm even one drug-related injury in the entire history of its sports program.* Ex. 4. The District "suspects" that one athlete may have been injured while competing on drugs, but that suspicion is based on evidence so skimpy it barely passes the straight-face test.[4] There simply is no tenable

[4] The wrestling coach testified that a high school student was injured in an "away" match when he failed to react quickly to a hold his opponent put on him. Tr. 110-11. *The next day* the coach went to the hotel room the wrestler was sharing with *three* other students. While there the coach smelled what he believed to be marijuana and concluded that "somebody in the room was smoking." Tr. 111-12. Of course, that "somebody" was not necessarily the injured wrestler, and even if it was him, it does not follow that he had also smoked marijuana before the match the day before. The coach was the first to admit that this evidence leads nowhere: "There was no way of particularly proving at that point in time whether he was under the influence [during the match]." Tr. 112.

evidence of any student ever competing in a District-sponsored athletic event while under the influence of illegal drugs.[5]

Third Misstatement: *The drug testing policy "accomplished its goal."* (Pet. at 13-14).

The goal of the policy was to keep student athletes from competing while under the influence of drugs and thus to prevent athletic injuries. But since there is no evidence that any students were in fact taking drugs and then competing, and since there were as many

[5] The Court may be as baffled as the Actons by the District's assertions that (1) drug use was rampant in its sports program and (2) drug-affected athletes present a grave risk of harm to themselves and their opponents, when the District admits that there have been no confirmed drug-related athletic injuries in the history of its sports program. That admission appears to disprove at least one of those assertions, if not both of them.

drug-related athletic injuries before the policy took effect as after -- to wit, none -- it is impossible to conclude that the policy accomplished anything except an invasion of student privacy.

It is true that some teachers noted an improvement in classroom behavior after the policy was adopted, but that wasn't the goal of the policy -- at least not the stated goal.[6] Moreover, since there is no basis for finding that the previously unruly students were unruly because of drugs, there is no basis for concluding that the policy had anything to do with the turnaround in their

[6] As discussed below, the policy originally applied to all extracurricular activities, athletic and nonathletic, Tr. 45-46; Ex. 5 at 16, and thus affected almost every student in the district. Later, the District limited the policy to extracurricular athletics. Tr. 45-46. Even with that limitation, the policy still affected over half of the student body. Tr. 20, 58; Ex 5 at 5.

behavior. The policy could not alter a condition that did not exist.[7]

Even if classroom deportment was entirely drug-driven, and even if the improvement in deportment was due solely to a decline in drug use -- big ifs on this record -- it still cannot be asserted, without resort to guesswork and speculation, that the decline in drug use was due to drug testing, rather than to the District's other drug eradication programs.

The District's own expert, Dr. DuPont, testified that drug use among high school students has declined steadily, both statewide and nationwide, since the mid-1980s, which includes the

[7] A school principal testified that it seemed to him that the number of disciplinary referrals rose before the policy was adopted and declined afterwards. Tr. 21, 43-44. But he provided no statistics to back this up. Moreover, there is no evidence that any of the referrals, before or after, were for illicit drug use.

period of time when the District's drug testing policy was in force. Ex. 106 at 13-15, 74; *see also* Tr. 45 and Ex. 106. Whatever caused this trend -- Dr. DuPont attributes it to decreasing societal tolerance of drugs and widespread publicity over the drug-related deaths of Len Bias and other prominent athletes -- may also account for the trend observed in Vernonia (if in fact there was a trend there).

Fourth Misstatement: *The Ninth Circuit held that the District's drug testing policy violates the Fourth Amendment.* Pet. at 17.

It is sometimes hard to tell whether a case has been decided on state or federal grounds where, as here, the complaint includes both state and federal

claims. In this case, however, the Ninth Circuit took care to explain that it was ruling for the Actons on their *state* constitutional claim, "in order to avoid addressing federal constitutional claims unnecessarily." 23 F.3d at 1518 (Pet. App. A at 12a-13a). At the outset of its opinion, the court said: "Before turning to a discussion of the substantive issues, we must address the somewhat arcane question of whether we should decide this case on the basis of the Oregon Constitution or on the basis of the United States Constitution." *Id.* (Pet. App. A at 12a). The court then noted that, although Article I, section 9, and the Fourth Amendment are worded almost exactly the same, Oregon nonetheless "insists that its constitutional provision can give more

protection than the federal constitution and that it sometimes does so." *Id.* (Pet. App. A at 13a-14a) (citing cases). "Furthermore," the court said, "Oregon courts, or judges on those courts, have gone out of their way to insist that the federal constitutional analysis does not control Oregon search and seizure analysis." *Id.* (Pet. App. A at 15a) (again citing cases).[8] The court concluded, therefore, that it was "constrained, in the first instance, to decide this case on Oregon constitutional grounds." *Id.* (Pet. App. A at 16a).

The court then proceeded with a lengthy discussion of Article I, section 9, and the Oregon cases

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[8] In one of the cited case, *State v. Tourtillott*, 289 Or. 845, 854, 618 P.2d 423, 427 (1980), *cert. denied*, 451 US 972 (1981), the Oregon Supreme Court said that it would apply "the Fourth Amendment analyses" of the United States Supreme Court, "although we are at liberty to adopt a stricter test under our own constitution."

construing it, which establish a three-part test for deciding Article I, section 9, search cases: (1) Was there a search? (2) Did the officials conducting the search have authority to do so? and (3) Was the search reasonable? *Id.* at 1519 et seq. (Pet. App. A at 22a et seq.). To the extent that Oregon precedents left some holes in the analysis, the court looked for guidance to federal caselaw. But the federal citations do not change the fact that what the court was deciding -- and all that it was deciding -- was whether the District's drug testing policy complied with the Oregon Constitution. That is why Judge Reinhardt felt compelled to write a concurring opinion in which he expressed his view that the majority opinion decided the case on both the

state claim and the federal claim. 23 F.3d at 1527 (Pet. App. A at 65a).

Omitted Facts: The District's statement of the case does not fully describe its drug testing policy.

As first enacted, the policy applied to any student who wished to participate in any extracurricular activity, athletic or nonathletic, including, for examples, band, drama, and student government. Tr. 45-46; Exh. at 15-16. Later, concerned that it might be overreaching, the school board limited the policy to athletics. Tr. 46-47.

As amended, the policy provides that no student at any level -- first grade through twelfth -- may participate in a district-sponsored athletic program

unless he consents, through his parent or guardian, to have his urine tested for certain illicit drugs at the start of the program, and also consents to random testing during the course of the program. Exh. 1. The drugs for which the district tests are cocaine, marijuana, amphetamines, and, occasionally, LSD. Exh. 4 at 4-5; Exh. 5 at 15, 17, and 24. Notably absent from this list is the most commonly abused drug -- alcohol. Id.[9] Also excluded are steroids or other performance-enhancing substances. Id.

Every athlete is tested at least once each year, at the start of the first athletic season in which he competes. Exh. 4 at 1; Exh. 5 at 21. Thus, if a student tries out for football or cross country, he will be tested in the fall.

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[9] The District Court erred when it said the District tests for alcohol. Pet. App. B at 92a.

If he skips fall and winter sports in favor of track or golf, he will be tested in the spring.

Student athletes are also subject to random tests, conducted weekly during each athletic season. Their names are written on separate pieces of paper and placed together in a box. A student is then selected to draw several names from the box while two teachers watch. The students whose names are drawn are notified and tested that same day; some are even called from class for testing. Afterwards their names go back in the box. Tr. 47-48; Exh. 4 at 3. There is no guarantee that any given student will ever be selected for random testing. On the other hand, there is no guarantee that any given student will not be

selected each week of every season in which he or she competes. Exh. 5 at 21.

The method of testing depends on the sex of the student. Boys are taken to the locker room, where, one at a time, they urinate into a vial while a male teacher watches and listens close behind. Tr. 38-41, 121-127; Exh. 4 at 4; Exh. 5 at 21-22. Girls produce their samples in an enclosed stall while a female teacher stands outside listening for the normal sounds of urination through a vent in the door. Tr. 72-75, 78-79; Exh. 4 at 4; Exh. 5 at 21-22.

Any student who refuses to be tested, as James Acton did, is automatically suspended from the sports program for the remainder of the athletic season. Exh. 1 at 1. If a student flunks the test -- that is, if his urine

tests "positive" for the presence of the target drugs -- he will be disciplined as follows. For a first "offense" the student will be given a choice between "[p]anticipating in an assistance program and taking weekly drug tests for six weeks" or "be[ing] suspended from participating in athletics for the remainder of the current season and the next season for which he/she is eligible." Id. at 2. For a second "offense" the first option is removed; the student is suspended for the remainder of the current season and all of the next season. Id. A third "offense" results in suspension through the next two seasons. Id.[10]

[10] At trial, Randy Aultman, the principal of James's grade school, was confused about the exact terms of the policy. He testified that a student who commits a second "offense" may continue participating in athletics if he submits to weekly counseling and drug testing. Tr. 51-53. The written policy -- which is alleged in the complaint and admitted in the answer -- clearly provides that a second "offense" results in an automatic suspension.

In the three and one-half years of testing before the trial in this case, only two students, both in high school, tested "positive." Tr. 64; Exh. 5 at 24.

V.

REASONS FOR DENYING CERTIORARI

There are several reasons to deny certiorari. Here are the main ones:

1. No Federal Question

The Court of Appeals decided this case under state law, not federal. It held that the District's drug testing policy violates Article I, section 9, of the Oregon Constitution. In deciding what Article I, section 9, requires, the court referred, at times, to Fourth Amendment cases, believing the Oregon

Supreme Court would do the same, since there are no Oregon drug testing cases. But that does not change the fact that what the Court of Appeals was doing was speculating on how the Oregon Supreme Court would decide this case under Oregon law if it had been filed in state court. This Court should not join in that speculation. Instead, it should follow its long-standing practice of deferring to the lower federal courts on issues of state law. *See, e.g., Richards v. United States*, 369 U.S. 1, 16 n. 35 (1962).

2. Risk of an Advisory Opinion

The Court of Appeals concluded that the District's drug testing policy violates the Fourth Amendment and, therefore, that it must also violate Article I, section 9, of the Oregon

Constitution, because Article I, section 9, provides at least as much protection as the Fourth Amendment, and probably more. As the court explained, "We can say with absolute confidence that the Oregon Constitution will not be construed [by Oregon courts] to offer less protection than the Fourth Amendment. [And] [i]t is highly likely that it will be found to offer more protection." 23 F.3d at 1518. That being so, a decision by this Court, whichever way it went, would not affect the judgment below. If the Court agrees that the drug testing policy violates the federal constitution that would, of course, leave the judgment intact. The result would no doubt be the same if the Court decided that the policy did *not* violate the federal constitution, because the Court

of Appeals, on remand, could still decide -- and given its view of Oregon law, probably *would* decide -- that the policy nevertheless violates the more-shielding state constitution. It follows that an opinion by this Court on the impact of the Fourth Amendment on the District's drug testing policy would probably be advisory and would not resolve this case.

The situation might be different if Oregon, like some states, construed its bill of rights to be coextensive with the federal Bill of Rights. Then, a ruling by this Court on the reach of the Fourth Amendment would decide as well the reach of Article I, section 9, and thus conclude this action. *Compare Kentucky v. Stincer*, 482 U.S. 730, 735 n. 7 (1987) (although the Kentucky Supreme Court found violations of both the Kentucky

Constitution and the Sixth Amendment, it gave no indication that respondent's rights under the former were broader than under the latter, and thus the Supreme Court's resolution of the federal claim would also decide the state claim). But, as the Ninth Circuit noted, the Oregon Supreme Court has repeatedly said that Oregon's constitutional safeguards may -- and often do -- reach farther than their federal analogues despite similarities in language.

This is especially true of Article I, section 9. The Oregon Supreme Court has regularly held that Oregon's search-and-seizure provision is not coterminous with the Fourth Amendment, and therefore is not controlled by federal caselaw. For example, in *State v. Caraher*, 293 Or. 741, 653 P.2d 942

(1982), the court abandoned Fourth Amendment jurisprudence in deciding whether a search incident to arrest was lawful under Article I, section 9. The court continues to chart its own course on that particular issue, disregarding federal precedents. *See State v. Hoskinson*, 320 Or. 83, ___ P.2d ___ (1994). In 1988, the court rejected the federal "reasonable expectation of privacy" test for determining what interests Article I, section 9, protects. *State v. Campbell*, 306 Or. 157, 759 P.2d 1040 (1988). That same year, the court declined to adopt an "open fields" exception to the warrant and suspicion requirements of Article I, section 9, similar to the exception this Court adopted for the Fourth Amendment in *Oliver v. United States*, 466 U.S. 170

(1984). *State v. Dixson/Digby*, 307 Or. 195, 766 P.2d 1015 (1988). Clearly, Oregon follows its own compass in deciding whether a government-ordered search is reasonable under the state constitution.

Years ago, Justice Jackson, writing for the Court, observed: "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). In the case at hand, an opinion from this Court would be nothing more than advisory, because even if the Court held that the District's drug testing

policy does not offend the federal constitution, the lower court would not be compelled thereby to disturb its conclusion that the policy offends the state constitution.

3. No Conflict among the Circuits

The District suggests that the Ninth Circuit's decision in this case is in conflict with the Seventh Circuit's decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988), which involved a random drug testing program similar in some respects to the one at issue here, but also dissimilar in several other respects.[11] In fact, there is no

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[11] The drug testing program at issue in *Schaill* was much less intrusive than the one at issue here. It did not apply to elementary school students, 864 F.2d at 1310; students were not observed while urinating, *id.* at 1311; and a student who flunked the test was not suspended from all competition, *id.* at 1311 and 1319. Moreover, in *Schaill*, unlike here, the

conflict between the cases, because, as explained above, this case was decided under the Oregon Constitution, whereas *Schaill* was decided under the federal constitution.

Moreover, *Schaill* is no longer good law. *Schaill*, decided in 1988, upheld a drug testing program for high school athletes because, the court said, the school district had a "substantial" interest in testing. 864 F.2d at 1321. But that is the wrong test. In *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), decided after *Schaill*, this Court held that the government-sponsored drug testing is constitutional if the

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record contained substantial evidence of both drug use by athletes and drug-related athletic injuries. *Id.* at 1310 and 1320.

government has a "compelling" interest in testing. *Skinner*, 489 U.S. at 628 ("[T]he government interest in testing is compelling.") and 633 ("In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns."); *Von Raab*, 489 U.S. at 677 ("In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a

firearm.") and 679 ("We hold . . . The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions . . . ."); *see also id.* at 668. 670 and 674. By adopting a compelling-interest standard, the Court implicitly rejected *Schaill's* substantial-interest standard.

This is not just word-play. A substantial interest is not necessarily a compelling one. A compelling-interest standard makes clear that the government must have a very good reason to subject people to such an extreme invasion of privacy as drug testing by urinalysis.

The facts of *Skinner* and *Von Raab* certainly are compelling when compared to those of *Schaill*. *Skinner* involved a drug testing program for railroad employees involved in certain types of train wrecks. The Federal Railroad Administration adopted the program after an 8-year study identified at least 45 accidents caused by drug-impaired employees, resulting in 35 fatalities, 66 non-fatal injuries, and over $28 million in property damage. 489 U.S. at 608. *Von Raab* concerned drug testing of customs employees who (1) were directly involved in the interdiction of controlled substances, (2) carried firearms, or (3) handled classified information. These employees, the Court noted, were in a position to "endanger the integrity of our Nation's borders or

the life of the citizenry." 489 U.S. at 679.

Following *Skinner* and *Von Raab* the federal appeals courts have approved drug testing programs for nuclear power plant employees, *IBEW, Local 1245 v. U.S. NRC*, 966 F.2d 521 (9th Cir. 1992); commercial truck drivers, *International Brotherhood of Teamsters v. Dept. of Transp.*, 932 F.2d 1292 (9th Cir. 1991); gas pipeline workers, *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir. 1990); commercial airplane pilots, mechanics, and traffic controllers, *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied* 498 U.S. 1083 (1991); correctional officers with direct prisoner contact, *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1988); police officers who carry weapons, *Guiney v. Roache*, 873 F.2d 1557

(1st Cir. 1989); and government employees with access to secret or top-secret government records, *AFGE, Local 1533 v. Cheney*, 944 F.2d 503 (9th Cir. 1991). These cases make clear that the government's interest in drug testing does not rise to the level of "compelling" unless it seeks to avoid obvious and catastrophic social harm, such as a reactor meltdown, a pipeline explosion, a plane, train, or truck crash, or a breach of national security.

The Ninth Circuit took note of these precedents when it concluded, in this case, that middle and high school athletics is not sufficiently "safety-" or "security-sensitive" to justify suspicionless drug testing. The court noted that a drug-affected athlete might hurt himself or an opponent -- although

it hasn't happened yet in Vernonia. And that, the court said, would be a "tragedy." 23 F.3d at 1526. But it is not on par with the potential tragedies that have justified other drug testing programs. There is no reason to believe that the *Schaill* court, writing today, post-*Skinner* and -*Von Raab*, and applying a compelling-interest test rather than a substantial-interest test, would reach a different conclusion. There is, therefore, no actual conflict between the decision below and the decision in *Schaill*, even on the question whether the federal constitution, as opposed to the Oregon Constitution, tolerates random drug testing of schoolchildren.

4. Inadequate Record

The evidence in this case does not squarely present the issue the District wants addressed -- namely, whether suspicionless drug testing is a lawful response to "rampant" drug use in a grade school athletic program. As explained earlier, there is no evidence of drug use by student athletes in the defendant school district, let alone rampant drug use. It bears repeating that the District has conceded that it cannot confirm so much as one drug-related athletic injury in all the years of its athletic program. If the Court wants to consider whether "rampant" drug use justifies random drug testing, it won't reach that question on this record.

5. Issue not Likely to Recur

Of all the public school districts across the country -- and there must be hundreds, if not thousands, of them -- only one other district -- the one involved in *Schaill* -- has resorted to random drug testing to solve a perceived drug problem in its schools. At least, that is the only other drug testing program identified in the District's petition. Of course, the *Schaill* program has already passed through the courts, and so it is unlikely, as things now stand, that the issues presented in this case will appear in any other.

The reason why other school districts have rejected drug testing was noted earlier in this brief: Drug use is waning without drug testing. Apparently, our children are finally getting the

now-ubiquitous message: Drugs are harmful. They are learning to say no to drugs without the threat of having to prove they did by producing urine for inspection on demand. To be sure, there is still a drug problem in our schools -- not including, apparently, the schools in Vernonia, Oregon -- but it seems to be resolving without the need for such heavy-handed solutions as compulsory drug testing.[12]

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[12] The District says that it adopted its drug problem only after "[h]aving tried all other reasonable alternatives." Pet. at 11. Hardly. The District did not try voluntary testing or testing on suspicion of wrongdoing, Tr. 56, two obviously less intrusive alternatives to compulsory testing.

The District did try various educational programs, including guest speakers who warned of the hazards of drugs. And these programs might have worked. The District has no way of knowing because it did not set up some method of monitoring the programs, such as tracking the number of disciplinary referrals before the program and after.

As noted earlier, some teachers perceived a improvement in student behavior after the drug testing policy took effect, which they attributed to the policy. But that improvement could also have been due to the educational programs. There simply is no way of knowing on this record.

The Court should decline to review this case without some evidence -- and there is none -- that the issues herein presented are likely to recur.

6. The Issue is not Ripe for Review

Even by the District's count, only two appellate courts have reviewed drug testing programs for school children -- the Ninth Circuit, in this case, and the Seventh Circuit, in *Schaill*. This Court would be well-advised to pass on the issue until more courts below have addressed it, if ever they do. That will ensure that the Court has the benefit of many viewpoints, and also demonstrate that the issue is important enough to warrant the Court's attention.

7. No Role for the Court to Play

This Court's review is discretionary, not obligatory. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Its mission, therefore, is not simply to correct lower court error or to give disappointed litigants one more chance to be heard. Rather, it is to announce new rules of law for the lower courts to apply.

In *Skinner* and *Von Raab*, discussed above, the Court established guidelines for random drug testing under the federal constitution: The government, the Court said, may test individuals without suspicion of wrongdoing if it has a compelling interest in testing which outweighs the individuals' expectations of privacy. The Ninth Circuit took these guidelines into account when it decided,

in this case, that the District's drug testing program violates the Oregon Constitution. 23 F.3d at 1523 et seq. (Pet. App. A at 40a). It concluded that, on this record, the District's professed interest in preventing athletic injuries does not outweigh the privacy interests of its students.

In its petition for writ of certiorari, the District does not challenge the *Skinner* and *Von Raab* guidelines. It does not ask the court to modify or overrule them. Indeed, it appears to be satisfied with how those cases were decided.[13] What the District

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[13] As noted, *Skinner* and *Von Raab* approved random drug testing where the government has a compelling interest that outweighs the privacy interests of the people to be tested. What more does the District want -- a rule that any governmental interest, compelling or not, justifies drug testing? that the privacy interests of those to be tested don't matter at all? The District does not identify the what new rule of law, if any, it would have the Court adopt if it granted certiorari.

is *dissatisfied* with is the way the Ninth Circuit applied the *Skinner* and *Von Raab* guidelines to the peculiar facts of this case. It wants this Court to grant certiorari simply to apply the guidelines itself and (the District hopes) come to a different conclusion about the relative weights to be assigned to the interests of the District and its students. That request for a fact-based application of an established rule of law does not invoke the Court's rule-making authority and thus does not warrant the Court's attention.

8. Issue Already Decided

In a confusing section of its petition, the District asks the Court grant certiorari to consider an issue supposedly left open in *New Jersey v.*

TLO, 469 U.S. 325, 342 n. 8 (1985): whether public schools may search students without individualized suspicion of wrongdoing. But the Court has resolved that issue, indirectly if not directly. In *Skinner* and *Von Raab*, discussed *supra*, the Court held that a government agency may test its employees for illegal drug use, even if it has no reason to suspect that any individual employee is using illegal drugs, provided the agency has a compelling interest in testing, such as public safety. Those cases "reaffirmed the longstanding principle that neither a warrant nor probable cause, nor, indeed, individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Von Raab*, 489 U.S. at 665, citing *TLO*, among other

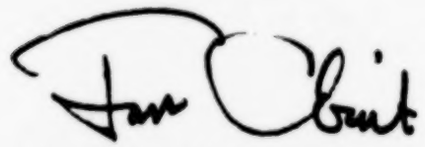
cases. Clearly, if adults can be searched without individualized suspicion of wrongdoing, so can schoolchildren. So that is not the issue in this case, as the District suggests. The issue, rather, is whether, in this particular case, the District's interest in testing its students outweighs their privacy interests. The Court of Appeals reviewed the evidence of drug use in the District's schools -- or, more accurately, lack of evidence -- and concluded that the District did not have a compelling interest in testing. This Court should not grant certiorari simply to re-weigh the evidence.

VI.

CONCLUSION

The Court should deny certiorari.

Respectfully submitted,



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No. 94-590

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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20 pp

STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Introduction

The central issue presented to this Court is whether the Ninth Circuit erred in applying a "compelling interest" test to the Petitioner's drug-testing policy. This Court should grant certiorari because there is a conflict between the Ninth Circuit's opinion and the Seventh Circuit, which applied a "substantial interest" test and upheld random drug testing under "very similar" circumstances. 23 F.3d 1514, 1527 (Pet. App. at 62a). Moreover, this Court should grant certiorari to resolve the unanswered question in *New Jersey v. TLO*, 469 U.S. 325 (1985), concerning the appropriate standard for searches in a school setting in the absence of individualized suspicion.

1. **The Petition for Writ of Certiorari Contains No Misstatements of Fact.**

Contrary to Respondents' contention, the Petition contains no misstatements of fact. As noted in the Petition, the facts were taken primarily from the findings of fact made by the district court. (Pet. at 4, n. 1). The specific facts Respondents contest are supported directly by findings of that court or the Ninth Circuit. The Ninth Circuit expressly found no clear error in the district court's findings. 23 F.3d at 1519 (Pet. App. A at 20a).

In *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1985), this Court held:

> The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which

> has been made by a district court and approved by a court of appeals.

468 U.S. at 98, n. 15. That is exactly what happened here. Respondents argued to the Ninth Circuit that the district court relied on inadmissible hearsay and that there was no evidence of an actual drug problem in the Vernonia Schools. The Ninth Circuit rejected those arguments. 23 F.3d at 1519 (Pet. App. A at 18a-20a). In an attempt to muddy the waters to avoid certiorari, Respondents once again raise questions about the facts which have long since been settled.[1]

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[1] Respondents say it is "curious" that Petitioner relies on facts found in the district court opinion since that opinion was reversed. (Resp. at 4, n. 1). That is irrelevant. The Ninth Circuit reversed the district court's holding on the law. It accepted the district court's findings of fact. *See, United States v. O'Donnell*, 303 U.S. 501, 508 (1938) (although the circuit court reversed the district court's holding, this Court refused to reexamine the evidence

2. This Court Should Grant Certiorari Because the Ninth Circuit's Opinion Presents a Federal Question and No Risk of an Advisory Opinion Exists.

Respondents claim that this case was decided solely on state law grounds (Resp. at 21) and that a decision by this Court might be an advisory opinion (Resp. at 22). Although stated as separate arguments, Respondents' positions are based on the assertion that the Ninth Circuit's decision rests solely on Article I, Section 9 of the Oregon Constitution. Respondent's arguments in this regard are flawed in two respects.

First, the Ninth Circuit's conclusion that the Policy violates the Oregon Constitution is premised *exclusively* on its conclusion that it violates the Fourth Amendment. The majority specifi-

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where the two lower courts made concurrent findings).

cally stated that: "in the specific area of urine testing - the core issue in this case - we will unabashedly refer to federal law and decide this case based on the Fourth Amendment." 23 F.3d at 1519 (Pet. App. A at 17a-18a). Likewise, Judge Reinhardt noted that "there is no way to 'avoid' a federal constitutional holding in this case" and that "our decision is based almost exclusively on the application of federal law." 23 F.3d at 1527 (Pet. App. A at 66a). In fact, Judge Reinhardt went so far as to say: "Any attempt to limit our decision to Article I, Section 9 would be sheer flimflammery". 23 F.3d at 1519 (Pet. App. A at 69a). Thus, this case raises an important federal constitutional question which is appropriate for this Court to review.

Second, an opinion by this Court would not be an impermissible advisory opinion because, to the extent the Ninth Circuit's decision is based on the Oregon Constitution, that decision was dictated by the court's interpretation of the Fourth Amendment. Thus, an opinion by this Court that the Ninth Circuit erred in interpreting the Fourth Amendment would render the Ninth Circuit's judgment invalid and, hence, would not constitute an advisory opinion.

Respondents maintain that such an opinion would nonetheless be advisory by asserting the purely speculative argument that the Oregon Constitution theoretically could later be interpreted differently from the federal constitution. (Resp. at 23-24). This Court, however, rejected such an argument in the analogous case of

Michigan v. Long, 463 U.S. 1032 (1983). In granting review in *Long* this Court stated:

> Even if we accept that the Michigan Constitution has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law.

463 U.S. at 1044.

Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), this Court held:

> Even if the judgment in favor of respondent must nevertheless be understood as ultimately resting on [state] law, it appears that at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases, and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of [state]

> law. . . . If the [state supreme court] 'held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide . . . these suits according to its own local law.'

433 U.S. at 568 (citations omitted).

Thus, this Court has held in *Long*, *Zacchini* and *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), that review should be granted to decide federal issues, even where a question exists as to whether a lower court decision rested exclusively on federal grounds, and even where a different state constitutional ground might later be asserted. In the instant case, no question exists that the Ninth Circuit's decision at a minimum "rested . . . primarily on federal law." *Long*, 463 U.S. at 1044. Indeed, Respondents concede this in asserting that "[t]he Court of Appeals concluded that

the District's drug testing policy violates the Fourth Amendment and, *therefore*, that it must also violate Article I, section 9, of the Oregon Constitution . . . ." (Resp. at 22-23). (Emphasis added). There is no question that this Court has jurisdiction and should grand review.

3. **<u>An Important Conflict Exists Among the Circuits as to the Standard Applicable to Random Searches in a School Setting</u>**.

Respondents claim there is no conflict among the circuits on the issue presented for review. (Resp. at 28). As the Ninth Circuit found, there is a clear conflict between the Seventh's decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988) *reh'g denied* (1989) and its own decision. 23 F.3d at 1527 (Pet. App. A at 62a-63a). Respondents nonetheless ar-

gue that *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602 (1989) and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) essentially overrule the Seventh Circuit's decision in *Schaill*. Respondents argue:

> There is no reason to believe that the *Schaill* court, writing today, post-*Skinner* and -*Von Raab*, and applying a compelling-interest test rather than a substantial-interest test, would reach a different conclusion. (Resp. at 35).

To the contrary, there is no reason to believe that the *Schaill* court, writing today, would apply a compelling-interest test rather than a substantial-interest test in the school setting. *Skinner* and *Von Raab* do not address the constitutional standard applicable to random drug testing in the school setting. *Skinner* and *Von Raab* only establish the standard for such tests in the workplace. Further, *Skinner* and *Von Raab* cannot be read to overrule *New Jersey v. TLO*, which held that the school setting requires an "easing" of Fourth Amendment restrictions and a "degree of flexibility" in the school setting. 469 U.S. at 339-340.

Thus, it is not surprising that the Seventh Circuit has cited *Schaill* since this Court's holdings in *Skinner* and *Von Raab* without casting any doubt on its validity. In fact, the Seventh Circuit, sitting *en banc*, said *Schaill* was based "on the idea that the Fourth Amendment applies with diminished force in the schools." *Dimeo v. Griffin*, 943 F.2d 679, 685 (7th Cir. 1991) (Pet at 26, n. 12). The Seventh Circuit thereby recognized that a lessor standard applies in schools than in the workplace context of *Skinner* and *Von Raab*.

4. The Issue in this Case will Continue to Vex Lower Courts and School Officials.

Respondents incorrectly assume that the issues raised by the Petition would only have bearing on random drug testing in schools. (Resp. at 37). As noted in the Petition, Petitioner is asking this Court to decide the constitutional parameters of suspicionless searches of any type in the school setting. (Pet. at 28). This Court expressly left this issue unanswered in *TLO* and should now decide it.[2]

---

[2] Petitioner is aware of at least one pending case, *Moule v. Paradise Valley Unified School District No. 69*, __ F. Supp. __, 1994 WL 503429 (D. Ariz. 1994), dealing with random drug testing in high schools, decided on the basis of the Ninth Circuit's holding in *Acton*. Petitioner is advised that the school district has filed a notice of appeal to the Ninth Circuit.

5. The Issue for this Court is Not Whether the Ninth Circuit Improperly Applied *Skinner* and *Von Raab* to the District's Policy.

Respondents claim that Petitioner is only dissatisfied "with the way the Ninth Circuit applied the *Skinner* and *Von Raab* guidelines to the particular facts of this case." (Resp. at 41-42). That is incorrect. The important issue Petitioner asks this Court to review is the Ninth Circuit's application of a compelling-interest test without taking into account the requirement of *TLO* that Fourth Amendment requirements be eased and that there be a "degree of flexibility" in the school setting.[3]

---

[3] Petitioner also challenges the Ninth Circuit's holding that schools do not have a compelling interest in safeguarding and educating students. (Pet. at 38).

6. **<u>This Court's Decisions in *Skinner* and *Von Raab* Have Not Decided the Issue Presented for Review</u>.**

Respondents concede that school children can be searched without individualized suspicion of wrongdoing in light of *Skinner* and *Von Raab*. (Resp. at 44). However, Respondents incorrectly assert that courts should apply a compelling interest test to random searches in public schools. (Resp. at 43-44). As noted above in Section 3, neither *Skinner* nor *Von Raab* established standards for searches in schools. (*Supra*. at 10). Further, they do not discuss or elucidate the effect of the *TLO* holding that Fourth Amendment requirements must be eased in the school setting. In the school setting, *TLO* clearly requires some standard less than the compelling interest standard this Court appeared to utilize in

the workplace setting in *Skinner* and *Von Raab*. This Court should, therefore, decide exactly what that lessor standard is.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: November 18, 1994.

Respectfully submitted,

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COUNSEL FOR PETITIONER

FILED
JAN 12 1995
OFFICE OF THE CLERK

(8)

No. 94-590

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

vs.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1994
CERTIORARI GRANTED NOVEMBER 28, 1994

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Opinion of the United States Court of Appeals for the Ninth Circuit issued May 5, 1994 .....Pet. App. A at 1a

Opinion of the United States District for the District of Oregon issued May 7, 1992 .....Pet. App. B at 76a

Order of the United States District Court of Appeals for the Ninth Circuit denying Defendant's Petition for Rehearing and Rejecting Suggestion for Rehearing *En Banc* filed July 8, 1994 .....Pet. App. C at 143a

CHRONOLOGICAL LISTING OF RELEVANT DOCKET ENTRIES

Date	Description
	A. United States District Court for the District of Oregon (Case No. 91-1154-MA)
11/04/91	Complaint for Declaratory and Injunctive Relief and Plaintiffs' Motion for Appointment of Guardians Ad Litem filed.
11/18/91	United States District Court for the District of Oregon grants Plaintiffs' Motion for Appointment of Guardians Ad Litem.
11/22/91	Defendant's Answer filed.
01/03/92	Plaintiffs file Motion for Judgment on the Pleadings.
03/02/92	United States District Court for the District of Oregon denies Plaintiffs' Motion for Judgment on the Pleadings.
04/28/92	Pretrial conference held and United States District Court for the District of Oregon issues Order receiving Plaintiffs' Trial Exhibits 1 through 5 and Defendant's Trial Exhibits 101, 103, 105 through 107 and 109, and rejecting Defendant's Trial Exhibits 102 and 108.
04/29/92	Trial commences in the United States District Court for the District of Oregon before the Honorable Judge Malcom F. Marsh.
05/07/92	United States District Court for the District of Oregon issues Opinion, enters Order denying Plaintiffs' claims for declaratory and injunctive relief, and enters Judgment dismissing action.
06/02/92	Plaintiffs file Notice of Appeal to the United States Court of Appeals for the Ninth Circuit.

Date	Description

B. United States Court of Appeals for the Ninth Circuit
(Case No. 92-35520)

09/22/92 Plaintiffs file opening Brief.

10/19/92 Defendant files Brief in Opposition.

11/04/92 Plaintiffs file Reply to Brief in Opposition.

11/03/93 Argued and Submitted to the United States Court of Appeals for the Ninth Circuit, before the Honorable Judges Stehen R. Reinhardt, Melvin Brunetti and Ferdinand F. Fernandez.

05/05/94 United States Court of Appeals for the Ninth Circuit issues Opinion and enters Judgment reversing and remanding Opinion and Order of United States District Court for the District of Oregon.

05/19/94 Defendant files Petition for Rehearing with Suggestion for Rehearing En Banc.

07/08/94 United States Court of Appeals for the Ninth Circuit files Order denying Defendant's Petition for Rehearing and Rejecting Suggestion for Rehearing En Banc.

C. The Supreme Court of the United States
(Case No. 94-590)

09/30/94 Defendant files Petition for Writ of Certiorari.

10/31/94 Plaintiffs file Brief in Opposition to Writ of Certiorari.

11/18/94 Defendant files Reply to Brief in Opposition to Writ of Certiorari.

11/28/94 The Supreme Court of the United States grants Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1154MA

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Plaintiffs,

vs.

VERNONIA SCHOOL DISTRICT 47J,
Defendant.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Deprivation of Civil Rights)

Plaintiffs allege:

PARTIES

1.

Defendant Vernonia School District 47J (the district) is a public school district, located in this judicial district, organized under Oregon law and acting under color of that state's law at all times mentioned below.

2.

James Acton (James) is a minor and a citizen of Oregon.

3.

Plaintiffs are citizens of Oregon and James's guardians ad litem.

JURISDICTION

4.

This case arises under 42 U.S.C. 1983 and 1988. This court has jurisdiction under 28 U.S.C. 1331 and 1343.

ALLEGATIONS COMMON TO ALL CLAIMS

5.

James is enrolled in a school operated by the district.

6.

The district has adopted a "Student Athlete Drug Policy," which prohibits a student from participating in any district-sponsored athletic program unless the student, through the student's "parent and/or guardian," consents to be tested for illegal drug use at the outset of the program, and also consents to random, suspicionless drug testing during the course of the program. (A copy of the policy is appended to this complaint as Exhibit A.)

7.

James wants to participate in district-sponsored athletic programs.

8.

James does not take drugs and the district has no reason to suspect that he does.

9.

James declines to consent to drug testing on the ground it violates his constitutional rights. Relying on the policy described above, the district refuses to let James participate in district-sponsored athletic programs.

FIRST CLAIM

10.

The district's refusal to let James participate in district-sponsored athletic programs violates the Fourth and Fourteenth Amendments to the United States Constitution.

SECOND CLAIM

11.

The district's refusal to let James participate in district-sponsored athletic programs violates Article I, Section 9, of the Oregon Constitution.

THIRD CLAIM

12.

The district's refusal to let James participate in district-sponsored athletic programs is unlawful because the district lacks statutory authority to adopt or enforce its drug testing policy.

FOURTH CLAIM

13.

Plaintiffs are entitled to recover reasonable attorney fees under 42 U.S.C. 1988 if they prevail on their first claim.

DEMAND FOR JUDGMENT

14.

Plaintiffs demand that the court:

(a) Declare that the district's drug-testing policy is unlawful;

(b) Enjoin the district from enforcing the policy against James and from interfering with his participation in district-sponsored athletic programs;

(c) Award costs to plaintiffs;
(d) Award attorney fees to plaintiffs; and
(e) Award any additional relief the court deems proper.

Respectfully submitted,

/s/ Thomas M. Christ
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OSB No. 83406
ACLU Foundation of Oregon, Inc.
Attorney for Plaintiffs

EXHIBIT A

Code: JFCI
Adopted: 9/14/89
Revised: 8/9/90
Orig. Code:

STUDENT ATHLETE DRUG POLICY

DEFINITIONS:

Drug:

Any substance considered illegal or controlled by the Food and Drug Administration.

Student Athlete:

Any student participating in athletic practices and/or contests under the control and jurisdiction of the Vernonia School District.

Sport Season:

Fall, Winter, and Spring seasons begin on the first day of practice allowed by the Oregon School activity Association and end the day prior to the beginning date of practice of the next season.

POLICY STATEMENT:

In order to provide for the health and safety of the individual athlete and other athletes, as well as providing a legitimate reason for students to say "no" to drug use and providing an opportunity for those taking drugs to receive help in locating programs which can provide assistance, the District is conducting a mandatory drug testing program for student athletes. The program is not punitive. It is designed to create a safe, drug free, environment for student athletes and assist them in getting help when needed.

PROCEDURES:

Consent:

The parent and/or guardian and the student athlete is required to sign a written consent for drug testing prior to participating in the athletic program. Any time an athlete refuses to be tested, he/she will be suspended from the team for the remainder of the season.

Medication:

Student athletes who have been or who are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested. Student's who refuse to provide verification and test positive will be subject to the actions specified below for "positive tests."

Student Selection:

All student athletes may be tested at the beginning of each season. Random testing will be conducted during the sports season. Students selected for random testing will be selected by having their names drawn from a "pool" of student athletes.

"Positive" Test:

If the student's test indicates positive results, a second test may be administered as soon as possible to confirm the results. Parents will be notified after the second positive test. If the second test is negative, no further action will be taken. If the second test is positive, the following action will be taken:

First Offense

1. Notify parent or guardian.
2. A due process hearing will be conducted by the principal with the parent/guardian and the student.
3. Student will be given the option of:
   a. Participating in assistance programs and taking a weekly drug test for six weeks or,
   b. Be suspended from participating in athletics for the remainder of the current season and the next athletic season. The student will be retested before beginning the next season for which he/she is eligible.

Second Offense

1. Notify parent or guardian.
2. A due process hearing will be conducted by the principal with the parent/guardian and the student.
3. The student is suspended from participating in athletics for the remainder of the current season and the next athletic season for which he/she is eligible.

Third Offense

1. Notify parent or guardian.
2. A due process hearing will be conducted by the principal with the parent/guardian and the student.
3. The student is suspended from participating in athletics for the remainder of the current season and the next two athletic seasons for which he/she is eligible.

VOLUNTEER DRUG TESTING

POLICY STATEMENT:

In order to provide for the health and safety of the individual student and other students, as well as providing a legitimate reason for students to say "no" to drug use

and providing an opportunity for those taking drugs to receive help in locating programs which can provide assistance, the District is conducting a voluntary drug testing program for students. The program is not punitive. It is designed to create a safe, drug free, environment for students and assist them in getting help when needed.

PROCEDURES:

Consent:

The parent and/or guardian and the student is required to sign a written consent for drug testing prior to being tested.

Medication:

Students who are or have been taking prescription medication must provide vertification (either by a copy of the prescription or by doctor's authorization) prior to being tested. Student's who refuse to provide vertification and test positive will be subject to the actions specified below for "positive tests."

"Positive" Test:

If the student's test indicates positive results, the parents will be notified and no other action will be taken.

GENERAL AUTHORIZATION FORM

I understand fully that my performance as a participant and the reputation of my school are dependent, in part, on my conduct as an individual. I hereby agree to accept and abide by the standards, rules, and regulations set forth by Vernonia School District Board and the sponsors for the activity in which I participate.

I also authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test

for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student.

This shall be deemed a consent pursuant to the Family Education Right to Privacy Act for the release of the above information to the parties named above.

_____

Student Signature

_____

Parent or Guardian Signature

_____

Address

_____

Date

_____

END OF POLICY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 91-1154MA

(Title Omitted in Printing)

ANSWER

Defendant, for answer to plaintiffs' Complaint, states as follows:

1. Defendant admits paragraphs 1, 2, 3, 4, and 5 of plaintiffs' Complaint.

2. Answering paragraph 6, defendant admits that it has adopted a student athlete drug policy, which policy is attached as Exhibit A to plaintiff's Complaint. Defendant denies each and every remaining allegation of paragraph 6 of plaintiffs' Complaint.

3. Answering paragraphs 7, 8, and 9 of plaintiffs' Complaint, defendant states that it is without sufficient knowledge to form a response to plaintiffs' allegations concerning the desires, activities and motivations of James Acton and for that reason denies the allegations of paragraphs 7, 8, and 9 of plaintiffs' Complaint. Defendant admits in further response to paragraph 9 that it declines to permit James Acton to participate in the district sponsored athletic programs without his having complied with the policy.

4. Defendant denies each and every remaining allegation of plaintiffs' Complaint except as specifically admitted above.

FIRST AFFIRMATIVE DEFENSE

5. Defendent's student athlete drug policy is rationally related to legitimate district interests including, inter alia, the health, safety, well-being and education of the students under its care.

SECOND AFFIRMATIVE ACTION

6. Defendant's actions were in good faith and based upon a reasonable belief of the lawfulness of the conduct alleged.

Wherefore, having fully answered plaintiffs' Complaint, defendant prays for judgment in its favor dismissing plaintiffs' claims, and prays for its costs and disbursements herein together with its reasonable attorneys' fees pursuant to 42 USC § 1988.

RESPECTFULLY SUBMITTED this 21st day of November, 1991.

LANE POWELL SPEARS LUBERSKY

By /s/ Paula A. Barran
PAULA A. BARRAN
OSB #80397
DAVID G. HOSENPUD
OSB #83241
Attorneys for Defendant

(Affidavit of Mailing Omitted in Printing)

[Filed May 7, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

ORDER

MARSH, Judge.

In accordance with my opinion issued on this date, plaintiffs' claims for injunctive and declaratory relief are denied.

IT IS SO ORDERED.

DATED this 7 day of May, 1992.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

[Filed May 7, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

JUDGMENT

MARSH, Judge.

Based on the record, this action is dismissed.

DATED this 7 day of May, 1992.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DIRECT-, CROSS AND REDIRECT-EXAMINATION OF JAMES ACTON

* * * *

[12] DIRECT EXAMINATION

* * * *

BY MR. CHRIST:

Q. James, how old are you?
A. 12.
Q. And what is your birth date?
A. June 15th.
Q. Do you go to school?
A. Yes.
Q. Where do you go to school?
A. Washington Grade School
Q. Do you like sports, James?
A. Yes.
Q. Which sports do you like?
A. Basketball and track and I don't know about football. I was going to go out for it.
Q. Did you go out for football last fall?
A. Yes.
Q. Did you go to any practices?
A. Practice, but after that, no.
Q. What happened after that?
A. I took home that sheet that we had to sign and we decided not to sign it over the weekend.

Q. Who's "we"?
[13] A. Me, my dad and my mom.
Q. You didn't want to sign it either, did you?
A. No.
Q. Why didn't you want to take the drug test?
A. Because I feel that they have no reason to think I was taking drugs.
Q. Do you still want to play sports if they'll let you play without taking the test?
A. Yes.

MR. CHRIST: That's all I have, Your Honor.

THE COURT: Cross.

MR. POWELL: I have a couple of quick questions, Your Honor.

CROSS-EXAMINATION

BY MR. POWELL:

Q. James, before you went out for football did you have a physical exam?
A. Yes.
Q. And as part of that physical did you give a urine sample?
[14] A. Yes.

MR. POWELL: We have nothing further, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. CHRIST:

Q. James, where was that exam?
A. At the Vernonia Health Clinic.
Q. And tell the judge how you gave the urine sample.

A. They had to close the door in there and peed in a cup and they handed it through a wall.

Q. Was anyone in the room with you?

A. No.

Q. No one was watching?

A. No.

Q. Was anyone standing outside listening?

A. No.

MR. CHRIST: Nothing further, Your Honor.

THE COURT: All right. Thank you. You may step down, James.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Case No. 91-1154-MA

THE HONORABLE MALCOM F. MARSH

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DIRECT- AND CROSS-EXAMINATION OF RALPH AULTMAN,
Principal of Washington Grade School and
Former Assistant Superintendent of Vernonia School District
and Former Principal of Vernonia High School

* * * *

[18] DIRECT EXAMINATION

* * * *

Q. Mr. Aultman, can you generally describe the Vernonia community?

A. Yes. Beings I was raised there and came back about 13 years later, Vernonia is a community about 1700 people in the city limits, about 1300 other people on the outside of the city limits. Primary industry is logging. We do have some people that work out in the valley and in the technological field Wah Chang, Nike, Tektronix. Low social economic factor in Vernonia, we have about 25, 30 percent of our kids who are on privalegde lunches.

The community is very solid from the standpoint that when the mill shut down in '59 they thought the city would fold, but it did not. It stayed together. So Vernonia is a typical small town, a lot of pride in its existence and it's like a lot of other small communities that aren't.

Q. Mr. Aultman, what role does interscholastic athletics play in the Vernonia community?

A. It plays a very, very big part. You know, you look around and you see about four or [19] five kids here from Vernonia and all of them are interested in sports and they all play sports because in Vernonia there's not much else to do. We don't have any fast food franchises, there are no teen centers, the entire factor of the community centers around the school, and therefore, the outlet for our young people is athletics.

It's a big thing. Everyone wants to play sports. It's an opportunity for competition and it—give you an example. In '83 we had a budget crunch. They were cutting teachers, we lost our forestry program. They were also going to cut athletics. Well, the people tried to keep the program, the academic programs there too, but many people went out and chopped wood and sold wood to finance the athletic program because it's all their kids had. A booster club was formed to try to get money to kept the athletic programs going because they realized it's a very important part of our community.

Q. And what role did the athletes themselves play in the community?

A. Well, if you're an athlete you're looked up to in our Vernonia system. Everyone wants to play if they can. And we deem it very important to [20] try and get as many people involved as possible. And it's just important, you know, to wear that lettermen's jacket in a small community. I still have mine from 1962.

Q. And can you estimate the level of participation in interscholastic athletics?

A. In high school we'll run 60 percent to * * * 65 percent of our students. At the elementary level you're running with the whole program I'd say pretty close to 75 percent of your students, so you're getting large numbers of kids.

Q. Mr. Aultman, in your 12 years in the school district have you had the opportunity to observe the patterns of drug and alcohol abuse in the district?

A. Yes, I have. Alcohol has been around high schools for a long, long time. Between 1980 and about 1986, '87 there was the typical—I was raised in Vernonia High School, a typical small high school with some minor problems, disciplinary referrals would amount to about 40 to 50 a year, no real strong discipline problems. We would have visitors come to our school and compliment how well our kids were doing and how well behaved they were in sitting in the classrooms and studying. And it [21] almost was like a few kids moved in the community and it seemed like in a period of the year I was gone and the next two years, the '87, '88 and '88 to '89 school year there was a real upswing in drug use by our students in the Vernonia High School.

I can equate this to seeing and having teachers come to me and having students being talked—talking in their classroom about drug use, about abuse, about parties. Kids were blatantly oftentimes talking about that they used drugs and there was nothing school officials could do. And what was really concerning us was a lot of these, it was the first. Back at the beginning when I was there in '84 and '85 they had a fringe group that used drugs. Very, very small. And they weren't really looked up to very much. They were kind of looked down upon. But in '86 and '87, '88, '89 were that shift that I saw many of our students, including our athletes, were starting to get involved in drug usage and it was mushrooming.

I had a coach come to me in 1988 and said, "I'm concerned about our football players because I'm hearing reports even from some of them that there's a possibility of amphetamines being used before they play football." That's shocking. [22] And that coupled with the amount of suspensions, in 1988-89 there were between 100 to 110 referrals that we had that year. There were kids acting out, they were shouting in the halls, they were banging heads together, they were writing essays in classes and coming to us that really scared our staff because we had prided ourselves on really helping our

kids. We're concerned and we care about them. We were scared. We were really concerned about these kids.

I had parents call me concerned about the drug use. I had—the school board was concerned. The community was concerned that when we approached the city council for two weeks they brought in a policeman from Portland that they hired for two weeks to try to patrol our areas across from the school to try and keep kids from using drugs. That lasted about two weeks, then he had to go. But we were facing some epidemic proportions of drug usage.

I feel and I think the evidence was there, that the community was saying it, there were students that were telling us, the staff was telling us and as the principal where we pride ourselves on a school that didn't have this. I was [23] very scared.

Q. Mr. Aultman, what were those areas where the police officers patrolled?

A. Well, across the street there was a place called Mario's Coke Shack, right across from the high school. Also there was a mini-mart over there, then down the road there's a bridge that the kids could go under. And this person the city council hired patrolled those areas to try to stop kids from using drugs.

Q. Mr. Aultman, what were the drugs in your opinion that were being used prevalently during that period?

MR. CHRIST: Objection, Judge. I don't think he's competent to testify—

THE COURT: If he knows. I want it from his own personal observations.

THE WITNESS: Go ahead.

MR. MULLMAN: Your Honor—

THE COURT: If you're going from your own knowledge, then I'll allow you to testify, if you have knowledge yourself of what drugs were being used.

THE WITNESS: Yeah, I do.

THE COURT: All right. Go ahead.

[24] THE WITNESS: The students were in my office and they have told me and—marijuana because they had

pipes and I confiscated them from students and they admitted it. Alcohol, and there was a report of the—that I have from the coach and the students on the amphetamines.

THE COURT: All right. These will be—I understand. These are hearsay reports. I want you to go into this a little more on how he gets these reports and why he gets them.

Q. (BY MR. POWELL) Mr. Aultman, can you describe how the reports of amphetamine use came to your attention?

A. Four football players talked to the football coach and admitted that they have used drugs, and amphetamines were those drugs, and the coach told me the kids never come forward and said, you know, they did. And marijuana, I did have that down to where I have the pipe and kids admitted it.

MR. CHRIST: Your Honor, I would move—

THE COURT: I realize that you're having continuing objection to this. I'm watching it very closely. Whether or not I consider this is an issue I'll confront.

What I have to look at is the perception [25] of what is going on. Now, I'm not going to rely on hearsay. What I want the questioning to address is whether or not there is a system set up within the school whereby reporting is to be made to the principal and that these reports came through that system. That's what I want to.

MR. CHRIST: I just want to preserve—

THE COURT: You have it preserved.

MR. CHRIST: Thank you, Your Honor.

THE COURT: Yes.

Q. (BY MR. POWELL) Mr. Aultman, in the Vernonia School District was there a system for reporting drug incidents or suspected behaviors?

A. Yes, there was. Because I was going to try and address this issue—well, I will try. Yes, we have—we train our staff in impact training to look for these behaviors that oftentimes were indicative of drug and alcohol use so we could work through the training sessions that

our staff had had to try and help students identify, deal with parents on drug and alcohol problems and the staff would write out these various incidences, they would write out what happened and they would tell me about it.

So there was a system set up to—to— [26] to report any type of observable behavior. And we trained all of our entire staff during those years to be on the alert and look for this and how we could stop it because we didn't sit still and idly watch this go on. We tried many things.

Q. Mr. Aultman, did you make any other attempts to determine or figure out how prevalent the drug use was in the district?

A. Other than some surveys done by some staff members, which they related back to me their results, and just from some of the kids, especially in the '88-89 school year admitting that there was nothing we could do to stop them. That's—

Q. And were they admitting drug use?

A. Yes. Openly.

Q. And in your opinion as part of this increase in illegal drug use, were the interscholastic athletes also a part of that increase?

A. Well, that was the thing that really concerned us. Like I said, 60 percent of the kids participate in sports and when we started the—when the drug usage really started and began, during the years of '87 to '89 it escalated to where we had a large number of athletes who were [27] using and openly admitting to many types to people, including the coach and a couple to myself that they used drugs, but they basically said there's nothing you can do about it. We did try and do things but that's not a question.

Q. So at this point was the district concerned about the use among athletes?

A. Oh, yes. Yes. Definitely. Because when that student had told the coach about using amphetamines, I immediately thought in my head what if this kid gets hurt and they take him to the hospital and it is true

that he's on amphetamines and we've been told and warned, are we liable? I was—that really concerned me when I heard of the amphetamine. Because like I said, we've had a lot of training.

I've gone through this drug thing, you know, about marijuana, amphetamines, the entire works, and so we were very concerned about the safety and health and welfare of our students, yes. And the athletes, like I said, 60 percent participate. That's a large number. And we saw more and more of those students actively promoting and actively demonstrating to us that they were out of control.

[28] Q. What efforts did the district make to provide education or motivation to the students to stop the drug problem?

A. We believe in education, number one. We not only taught units on drug and alcohol in our classrooms, we brought in guest speakers over a two-year period. I spent over—between four to $5,000 in bringing in speakers to talk to our young people about the effects of drugs, Dutch Savage Associates, Theresa Lush, we brought in Javonne Wilson, or Javonne White, a comedian who did a video called "Waking Up To Drugs." Cost us over eight or $900, to bring this man up from L.A. to try and help us.

Brought in drug dogs to try to sniff lockers. We—we set up with our staff and brought experts out to work with every staff member on how to identify and how to deal with the drug-related problem. How we could help our young people, because that was the bottom line. We just saw some kids being very much at risk. And everything we tried did not seem to work.

It continued. We would have kids get suspended. Like I say, referrals were very, very high. There was two or three expulsions. We'd try [29] everything in our power from punitive discipline to having our staff work with kids, to bringing in drug dogs and authorities and speakers and like I said, we spent a lot of money trying every resource at our command to stop the problem.

Q. Can you recall any specific reactions to some of those speakers or some of those programs?

A. Theresa Lush, a psychologist came in and talked about her son who was addicted, how she tried to get him cleaned up but then he went back. And all of our student body—we worked the system around so every kid could hear every speaker whenever we had it. During one year we spent a whole month on drug awareness to our kids. And we spent the last big week by bringing in as many—there was things going on all during the month. And we brought in all these speakers. One of them, like I said, was Theresa Lush. Her son Bill couldn't get off drugs. So she told how she had to let him go. There wasn't hardly a dry eye in our students. It affected them.

Dutch Savage talked about how he had used and abused drugs and how his mind was scrambled. And he had an assembly in front of all the students and went to all the individual class rooms. [30] Javonne White, like I said, talked to the entire group and then split out.

We had a Seahawk player, I can't remember his name right now, one of the well-known guys, but we had a Seahawk player come in and speak.

We ran the gauntlet of trying to educate. And after Dutch Savage got through I heard kids saying, "Well, Dutch Savage, he was addicted. Look now, he's out selling the program. He came out of it and we can too." That was the mentality that we got from some of our kids after our speakers.

And the major thing was it wasn't going to happen to them. They could not see that.

Q. How did you decide to explore drug testing by urinalysis?

A. Well, in '89, the spring, our school, because of the behavior of our students, the referrals, the suspensions, the parent conferences, all the things that were happening, the staff got together and we were trying to help our young people. It was going to boil down to some tremendous alternative or massive expulsion. We were going to

have to expel a large number of students. And our staff did not like that idea.

If you expel students basically they're [31] out on the streets and nothing happens. They're back in six months after the semester, and you really don't solve anything. That's when in the spring it came to our attention through *The Oregonian,* a supplement in the Sunday edition called Parade, there was an article entitled "The Town Sends A Note To Drugs." It's about a three-page article, about a town, a community in Texas called Hawkins who had instituted a mandatory drug testing program for extra curricular activities.

I had previously been approached in 1988 by a president of the Booster Club advocating drug testing. This is even before the Hawkins story broke. Because there were some things happening in the federal courts that were relevant to things about drug testing. This Booster Club person wanted to know if we could do it. I said no, I would not do it until I knew there was no other alternative and I had the community support. I was not going to step out.

* * * *

[36] Q. Okay. Mr. Aultman, in designing the policy what was your purpose?

A. That's where the rationale came in. The purpose is threefold. One, safety. That scared me as a principal when I heard of a possibility of students playing with amphetamines because that's where Len Bias, all the things we'd read about this really, really concerned us.

We wanted a policy that was not punitive. We're not—we did not want to go out and get kids. These are not bad kids that we're talking about that were on drugs and that were abusing. These are good kids that were out of control with what was being taken. Our concern is with them too. So we did not want a policy, a policy that was punitive and was kick them out, get them out of here and be done with it, because we would not have had to do this program if we just wanted to expel kids.

So we wanted a prevention program and [37] intervention program built into our drug testing system where there was buy-back, where we could get help if needed. We really wanted to do it from a non-punitive stance.

* * * *

[41] Q. Are the boys clothed during this procedure?

A. Yes, they're totally clothed.

Q. What can you see of the student during this process.

A. Nothing.

Q. Are the student's genitals exposed at any point during this procedure?

A. Never, ever. And the shower rooms here, I go through here all the time and the kids are in the shower. But here on our drug testing, no.

Q. Mr. Aultman, is that shower area a communal shower?

A. Yes, it's open right here. Communal. Anybody walking through this door or coming through this door here can see undress.

Q. And this locker room is where—is that where grade school boys dress down for athletics?

A. Yes.

Q. And, Mr. Aultman, is the toilet enclosed by a stall?

A. The stall is right—there's a wall comes out here, but this is open. I should not have that in there because it's an open area.

[42] Q. So there's no door on the stall surrounding the toilet?

A. No. No.

MR. POWELL: I'd like to have this diagram marked as Defendant's Exhibit 110.

[Defendant's Exhibit 110 is a diagram of the grade school boy's locker room]

THE COURT: It will be marked as 110.

MR. POWELL: Your Honor, I'd like to offer that into evidence.

MR. CHRIST: No Objection, Your Honor.

THE COURT: It will be received.

(Defendant's Exhibit 110 received.)

Q. (BY MR. POWELL) Mr. Aultman, who has access to the results of the drug test?

A. Superintendent, principal and vice principal of the high school. And the athletic director of the high school and grade school.

Q. Mr. Aultman, can you describe briefly where are the girls samples collected?

A. In the girls' locker room. At the elementary school Mrs. Peterson, our athletic director, does the paperwork right there while the student is going to the restroom and in there the doors are closed. Students do go into a closed door. Because on the girls in our school there are doors at the elementary level. At the boys just on [43] the one there is not.

Q. So the girls give a sample within an enclosed stall?

A. Yes.

* * * *

[45] CROSS-EXAMINATION

BY MR. CHRIST:

Q. Mr. Aultman, are you aware that there's been a nationwide and statewide decline in drug use by high school students in the last few years?

A. I think that's on an average and yes, I'm aware of that.

Q. Okay. So you have no reason to conclude that the drug policy rather than just the general trend is responsible for the decline in apparent drug use, isn't that correct?

A. I have a different opinion on that. I was there. I saw the differences and I believe there was a difference.

Q. Your policy as originally enacted wasn't limited to sports, was it?

A. In our beginning when we looked at Hawkins and talked of Hawkins, the model was much like theirs, which was other areas, but then we [46] decided that that was not going to be the right way to go.

Q. My question was the policy was originally enacted beyond sports?

A. Correct.

Q. To all extracurricular?

A. Correct.

Q. What are some of your extracurricular activities other than?

A. We have band, we have drama. Those are two. Leadership class officers, class officers.

Q. Did you have any injuries in the course of those activities?

MR. POWELL: I'd like to make an objection, Your Honor. What's at issue is the present policy to test interscholastic athletes.

THE COURT: Overruled. Go ahead.

Q. (BY MR. CHRIST) At some point in time you changed the policy to limit it to just sports; is that correct?

A. Right.

Q. Okay. Why?

A. Because after the research we're talking about advanced previously we determined that it was not legal if we carried any farther with those [47] areas because of what we had seen, so we knew that in the federal courts in Indiana it had been upheld for the athletics.

Q. So the justification for the current policy is the concern for its legality? Is that correct?

A. Well, only from the standpoint that we had to have that we felt to get by with our drug problem we had in our school, sir.

Q. How are students selected for testing?

A. The very first of the season they're all tested. Okay, like in the fall sports season, all the students are tested. Thereafter, they are randomly picked. Ten percent of the total number that are out for sports are drawn

at random, and we decided to have the students buy in by having them be the ones that would be tested. They can't see who they're picking as they pick it out but we—

Q. How often do you drawn names?

A. Every week.

Q. Do you draw during the school day?

A. Yes.

Q. How many students then do you select?

A. Example, if you have 30 people out we would usually do about three.

[48] Q. Do you do the testing at the same time?

A. As soon thereafter as possible that day, yes.

Q. So you would draw a student from the classroom to go test them?

A. Sometimes in the classroom it can be, if that's when they can go. It takes about five minutes, but we do it also sometimes at noon, after school, before school, breaks, yes, sir.

Q. You take the students to the locker room?

A. Yes.

Q. One-by-one?

A. Yes. On the random.

Q. On the Random?

A. Yes.

Q. And you're present while the student gives the urine test for the boys?

A. Yes, I'm in the room.

Q. Are you watching them while they urinate?

A. It varies. Most of the time if I find something to work on, because the proximity, the way the urinals are, there's no—there's no water to be tampered with, so I may or may not. It's not a necessary thing that I have to do. I don't train myself to watch the kids.

[49] Q. You're close enough to watch?

A. Yes.

Q. Okay. And you're listening as well?

A. From where I am on the bench I really couldn't hear. I don't recollect ever trying to hear them do they.

Q. You're close enough to hear?
A. Yes.
Q. Have you caught anyone cheating?
A. I have not caught anyone cheating, no.
Q. But you're there to prevent cheating, correct?
A. True.
Q. To that extent you're listening and watching the students doing it?
A. I can see what the students are doing, yes?
Q. What if the students can't urinate at that precise moment?
A. We let them go back to class and come to us when they can.
Q. I think you referred to the policy as non-punitive. What exactly do you mean by that?
A. When we first got Hawkins's program on the first offense that there was a positive test, [50] they suspended a kid for the remainder of that athletic season and did not allow them to participate.

We built into our policy that on the second—after their first test was positive we tested nearly for a second time immediately. If it was a double positive to bring the parents in, notify them we have a double positive and then there's two alternatives for the student. We tell the sudent, "Look, there's twice positive. You know, we're going to offer you these services which we have people with programs to help, intervention," and if they agree to that and if they'll be tested weekly to show they're trying to quit the drug, we will let them continue to participate.

No other program that I know of and have read about allows the students that opportunity to stay involved and that's what I mean by non-punitive. We're not threatening we're going to exclude you totally from the program or suspend you or any of that type of thing. And nothing happens to the students if they are positive, as far as academics and being excluded from school.

Q. For a first offense—and that's the [51] word you used, correct, the first time you flunk the test?
A. Yes.

Q. You give them a choice, they can either get kicked off the team or they can be forced to go to counseling or undertaking further testing. That's the choice, isn't it?
A. Yes.
Q. And they can't say "I don't want to be here?"
A. If they say they don't want to do it, then they're excluded.
Q. Okay. And you don't consider that punishment?
A. I believe extracurricular activity is not required, so no, I don't consider it—
Q. Don't you think that students who are kicked off the team or are made to go to counseling and made to take urine testing would consider themselves punished?
A. I can't answer that.
Q. Okay. For a second offense, you don't get any option, do you?
A. You still have the option that you can still do that, and within a couple seasons you [52] can—within the—depends when the season occurs, okay? It's the third offense that the student is totally off for the year. The second offense is very similar to the first offense, I believe. Because we're trying to give them some time.

THE WITNESS: Could I have some more water, please?

MR. CHRIST: While you're up could the witness be handed Defendant's Exhibit 104, please.

THE CLERK: (Handing)

[Defendant's Exhibit 104 is the Vernonia School District's Student Athlete Drug Policy]

Q. (BY MR. CHRIST) Would you look at the top of the second page of that exhibit—
A. Uh-huh.
Q. —Where it says "Second Offense." Does that refresh your recollection about whether a student is automatically kicked off a team for a second time?
A. I need a clarification. You're saying that on the second offense of this policy that the student is excluded from all athletics for the year. Is that what you're saying, sir?

Q. Listen to my question. For a second offense a student is suspended for participating in athletics for the remainder of the current season in [53] the next athletic season?

A. True.

Q. There's no option to say, "I'll continue in a program and go to counseling," is there? You don't get the choices you get for the first offense, do you?

A. Yes, you do. It's just not spelled out there.

Q. It's not spelled out in the policy?

A. Right. Exactly. We have a policy here the student's suspended from participating in athletics for the remainder of the current season and the next season for which year he or she is eligible.

Q. So are you suggesting the policy is inaccurate?

A. No, it's not inaccurate. The policy just does not refer back to the participation in the assistance program of the weekly drug test, but is understood that it is only on the third offense that there's a total removal for the entire year.

Q. Okay. Is that punishment?

A. Again, that's—that's an opinion. To me there's been an opportunity. It would depend on the person.

[54] Q. You mentioned use of drug dogs.

A. Uh-huh.

Q. And what did you do with the dogs?

A. This is an attempt many schools are trying to—at that time Vernonia is not the only school that is going through this, the throes of drug problems. There are other school districts, Scappoose and others in Columbia County, and there was a use of a drug dog unit in Columbia County which is accessible to the school.

There were several parents, like I said, who were concerned about the problem of drugs in school. That was one of the things they advised us to do to, use a drug dog to see if there were drugs in school.

Q. They went around with dogs—

A. Yes, and sniffed lockers.

Q. Did you find any drugs that way?

A. Yes. But unfortunately we messed it up.

Q. How'd you mess it up?

A. The dogs stopped at a locker. We got the student out of class to open the locker for us and we searched through it. This was right before lunch. Fourth period. In the locker was a transistor radio. I picked the radio up, not [55] thinking to go through that device. I could not find any drugs. So we shut it back up and told the kid we apologized to him, that it was something wrong with the dog.

I had some—two students immediately come up to me when the bell rang for lunch. They said, "Mr. Aultman, check the locker, it's in where the batteries are normally kept. That's where the marijuana is stashed." I immediately went to the locker and the transistor radio was gone.

Q. Any other drugs found through use of dogs?

A. No.

Q. How many times did the dog come to the school?

A. One.

Q. Why didn't you continue that program?

A. We felt it wasn't effective. It wasn't effective.

Q. After trying it one day?

A. Yes.

Q. Have you tried voluntary drug testing?

A. No, we haven't because in the school that we have, Churchhill and other schools we studied at this time found to be very ineffective in our [56] opinion.

Q. But you didn't try it?

A. No.

Q. Did you try drug testing only those students that you suspected of taking drugs?

A. You run a real fine line of reasonable suspicion, probable cause, and we—we really felt that by trying to design a policy that combined all of our kids and, like I said, no, we did not.

Q. You have a general search and seizure policy at the school. Don't you?

A. Yes.

Q. And that's expressed in the student handbook, isn't it?

A. Yes.

Q. Okay. And that permits you to test only on the basis—or to search a student's person only on the basis of reasonable suspicion; is that correct?

A. That's correct.

Q. So your mandatory drug testing policy is inconsistent with that policy, isn't it?

A. That has not been decided in Oregon yet. That's what we're here for today.

Q. I don't want to know about the legality [57] of the policy, I just want to know that it's inconsistent with your general search and seizure policy, isn't it?

A. In my opinion, no.

Q. Well, you have no reason to suspect James of taking drugs, do you?

A. No. No, I do not.

Q. Nevertheless you insist that he take tests if he want to play sports?

A. Yes.

Q. Have you ever seen any students taking drugs? Ever caught anyone in the act?

A. No.

Q. So your knowledge about any drug use is based on hearsay reports from others, isn't it?

A. And what I know about kids, yes, it is, and my own knowledge. I perceive the training of drug characteristics. I draw conclusions based on my knowledge and training.

Q. I think you mentioned four wrestlers who went to the coast and said—admitted they'd taken drugs?

A. Yes.

Q. Were they wrestlers or football players?

A. They did both.

[58] Q. And then they passed it on to you, that information?

A. Yes, the coach did.

Q. And that's the basis for your conclusion that you've got a drug problem?

A. No. The behavior—no, I—I can't agree with that.

Q. I think you said that athletes are generally looked up to in the community?

A. Yes, they are.

Q. All of them?

A. To my knowledge.

Q. 70 percent of students participate?

A. 60 percent.

Q. At the grade school level?

A. Oh, at the grade school. 70 percent, yes.

MR. CHRIST: That's all I have Your Honor.

THE COURT: Redirect.

MR. POWELL: Nothing Your Honor.

(Recess)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF CROSS-EXAMINATION OF ELLIS MASON,
Superintendent of Vernonia School District

* * * *

[64] Q. Since you implemented the drug testing policy how many students have flunked the test?

MR. POWELL: Objection. Outside the scope.

THE COURT: Overruled. I'm going to allow the question. Go ahead.

Q. (BY MR. CHRIST) How many students have flunked?

A. Two or three, I believe.

Q. And that's in what, three years, policy's been in force?

A. That's correct.

MR. CHRIST: Nothing else. Thank you.

THE COURT: Redirect.

MR. POWELL: (Shakes head)

THE COURT: Thank you. You may step down.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DIRECT- AND CROSS EXAMINATION OF MARCIA KING,
Vernonia School District Teacher and Athletic Director

* * * *

[66] DIRECT EXAMINATION

* * * *

Q. You indicated you grew up in Vernonia?

A. Yes, I did.

Q. And your current position with the district?

A. I'm a teacher and athletic director and leadership of student council advisor.

Q. And over your 18 years in the district did you have the opportunity to observe the frequency of injury to extracurricular athletes?

A. Yes, I have. Both as a coach and as athletic director.

Q. Did you notice any trends in the late 1980's, let's say 1985, 1989 as far as injuries in the district?

A. Yes. There—the frequency and also the severity of type of injury seemed to be one of esculating.

Q. And over your 18 years in the district did you have the opportunity to observe any increase in students' use of illegal drugs or alcohol?

A. Yes. Some of that was hearsay. By [67] listening to students' conversations and also my observation of students, small groups of students across the street at the high school at a small restaurant, La Mario Coke Shop which is directly across the street from the school office, observation of them passing joints back and forth among

themselves during the noon hour and sometimes before school.

Q. Did you have the opportunity to observe over those 18 years whether there was any noticeable trend in the use of illegal drugs?

A. Again, observation and—of students' behaviors, training and stuff, again this is my opinion and in the school, within the classroom, within the halls, during sporting events and the blatancy on which students would talk about their drug use and in the classroom, in the hall, there was a hostility, a power struggle among students and teachers.

In the classroom it was very difficult to teach because we dealt with this anger and this hostility. This is indicative of drug use. Also other things too can play a role, but primarily the drug use appeared to be the forerunner because of the students' conversations.

[68] Q. Are you familiar with the term " The Big Elk"?

A. Yes.

Q. Can you tell the Court about where that term came from and what it denotes?

A. I'm not really sure where it came from, but it was a group of students, athletes and actually that's about all I know about it.

Q. Were they—from your observation were they involved in use of illegal drugs?

A. Yes.

Q. This again is in the time frame of the late 1980's?

A. Yes.

Q. Did you ever personally observe students under the influence?

A. Yes, I did. I had a student arrive in my classroom after a lunch break and I had to escort him to the office. He was clearly obviously inebriated and was sent home from school.

Q. Back to the Big Elk. Were there some unusual behaviors of those individual students who were student athletes who were identified as members of the Big Elk?

A. There was a thing with each other in the [69] hallway and there were the loud bugling, the loud conversations, down the hall. It was more or less a signaling to each other and a camaraderie.

Q. Was that different than it had been, say, in the early 1980's, had you seen that type of behavior before?

A. No, I hadn't.

Q. What's a disciplinary referral?

A. A disciplinary referral is a form which the teacher fills out which states the behavior of a student or unacceptable behavior of a student in a classroom and a hall, even on the school premises, and describes that behavior. And then it is then also referred to students who sign a rebuttal or a comment in regard to the discipline and then it's sent on to the office.

Q. Is this a standard practice within the district?

A. Yes, it is.

Q. Did you notice any change from the early 1980's to late 1980's and the number of disciplinary referrals?

A. I can speak for myself, yes. In my own classroom I used to pride myself on the fact that I could handle my own discipline, and in 1985 a group [70] of students entered my classroom and I had a number of these students that were in the—this little group, this Big Elk group, and it came to a point where I had to send referrals to the office and my referrals alone increased in number on a weekly, sometimes on a daily basis for a period of time until some of those students were released from class.

Q. Now, since adoption of the drug policy have you noticed any change in the number of disciplinary referrals from your classroom only?

A. Yes. Terribly. Again back down to my own problems of having to refer to the office.

Q. Is there in fact a decrease?

A. Decrease? Considerably, yes. In fact, almost zero.

Q. From your observation was drug and alcohol use prevalent among students participating in interscholastic athletics in the late 1980's?

A. Again, observation and the hearsay of students who were talking about the use of amphetamines, even diet pills if they could get them from their mothers' cabinets, conversations within my classroom.

Q. And you dealt primarily with the female [71] athletes?

A. Yes.

Q. And were the female athletes also talking about drug use as well as the male athletes?

A. Yes, they were.

* * * *

[75] Q. All right. Would you tell us how a student comes in to be tested?

A. I bring them into my office area here, set them down at a chair next to me at the desk, go through the process of paperwork. They do—they then enter into this restroom area, which is right beside my shoulder. There is a toilet area and a shower area here.

Q. That restroom has a door on it?

A. Yes, it does. A closed door. It does have a grate—an air type grate there to that.

Q. So the female student enters into the restroom and produces the urine sample?

A. Right, and brings it back out to me and I finish up the process and then they leave.

Q. Is the female student clothed?

A. Yes, they are.

Q. Do you directly observe the urination?

A. No, I don't.

Q. You're outside the door so you could hear the natural sound of urination?

A. Yes.

MR. MULLMAN: Thank you. Would you mark that Exhibit 111.

[Defendant's Exhibit 111 is a diagram of the high school girl's locker room]

[76] THE CLERK: 111?

MR. MULLMAN: Your Honor, we would offer 111.

MR. CHRIST: No objection, Your Honor.

THE COURT: Received.

(Defendant's Exhibit 111 received.)

Q. (BY MR. MULLMAN) The locker room has communal shower?

A. Yes.

Q. That is a communal dress area as well?

A. Yes, it is.

Q. Is this the area that's normally used by female students interscholastic athletes in dressing down for their activities?

A. Yes, it is.

Q. Since the adoption of the drug policy have you noted any trends in the frequency of injuries to interscholastic female athletes?

A. I have not divided it between female or male athletes, but as athletic director there has been a decrease in the number of accidents that come through my office, yes.

Q. And those accident reports normally come to your office; is that correct?

A. In formal conditions, yes. Sometimes [77] bypass to the main office, but I am aware of accidents.

MR. MULLMAN: Your witness.

CROSS-EXAMINATION

BY MR. CHRIST:

Q. What girls sports are offered by the district?

A. In the fall we have volleyball and cross country. I'm speaking for the high school level. And in the winter sports we have girls' basketball and in the spring sports we have track or golf.

Q. Have you had any injuries in the golf program?

A. Not recently, no. But in the past years we have during the late eighties.

Q. What kind of injuries?

A. Hit with a golf ball. And also one person was accidentally struck with a club.

Q. What kind of injuries do you have in the track program?

A. Muscle-type injuries, pulled muscles, improper warm-up. But you also have the potential for javelin or discus-type injuries.

[78] Q. I don't want to know about the potential, I want to know what injuries—

A. What we normally—primarily muscular injuries.

Q. And this is the same type of injuries in the cross country program, I take it?

A. Yes.

Q. And in basketball?

A. Muscular, but we also have knee injuries, we have shoulder injuries.

Q. Okay. You just finished the basketball season, did you?

A. Yes, we did.

Q. Did you have any injuries during that season?

A. Yes, we did.

Q. What kind?

A. Knee, ankle.

Q. What knee injuries?

A Types of torn ligaments or cartilage where they need surgery.

Q. During the testing did I understand you to say there's a grate on the door to the restroom?

A. Yes, there is.

* * * *

[80] Q. Have you ever seen students take drugs and then play sports?

A. No. Not immediately play the sport, no.

Q. Have you ever seen a student take drugs?

A. Yes, I have.

Q. How many times?

A. There were numerous times with observation from the school office to the restaurant across the street of the smoking of marijuana.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DIRECT- AND CROSS-EXAMINATION OF KATHLEEN SEVIG,
Vernonia High School Teacher

* * * *

[85] DIRECT EXAMINATION

* * * *

Q. How are you currently employed?

[86] A. I'm a language arts teacher at Vernonia High School.

Q. How long have you been so employed?

A. 13 years.

Q. And what are your current classes that you teach?

A. I teach English, World Literature, survey of lit and comp, which are required courses for all students. I teach Speech and I'm a drama director.

Q. Are you involved in any way with scholastic athletes at Vernonia?

A. Only in the sense that I teach student athletes.

Q. You have a child that's involved?

A. My son is a junior in high school in Vernonia and he is involved in student athletics.

Q. But you are not a coach or anything like that?

A. I am not a coach.

Q. Over the years at the district did you observe any trends in students using alcohol and illegal drugs?

A. Yes.

Q. And over that 13 years would you tell the court what you did, in fact, observe?

[87] A. When I first came to Vernonia in I believe 1979, the first year that I taught I followed a teacher who had been there for 30 years and I had a few discipline problems just because students were testing me. But after that for the next ten years I prided myself on and I've always provided myself, I've taught for 23 years, on my ability to handle the discipline in my classroom.

One of the goals of my teaching is to establish a positive climate of trust between myself and my students, and I have been able to do that. However, in the late eighties I would say beginning the years '85 thorugh '89 I noticed a tremendous difference in the kind of behavior problems I was having to deal with. Completely different than I had dealt with the previous years.

Q. What kind of behavior problems were those?

A. I could characterize them as students who were much more hostile, who wanted to dominate the classroom, whose behavior was very erratic and I think the other word I would use is very, very gross and inappropriate. Much different than I had in the previous 16 years. Something that I noticed considerably and was unable to deal with myself as [88] I have been able to deal in the past.

Q. And in that period '85 on did you notice there was a significant increase in drug talk?

A. If I could, I could give a specific example. I am trained in writing using the Oregon writing project model and that model is based on using personal experience as a beginning point for writing. And my students using that model, often I've had students write about things which are—well, they all write about things that are incredibly dear and important to them, and I've had to deal with things like sexual abuse and drug abuse in the home.

During those three years I began getting essays from students with the theme of—I remember one essay in particular, the name of it was "Party Till We Puke," and it was written by a student who wrote an essay about the goings on of he and his friends, their drug use, their

parties and he glorified it in the essay. And that was only one example that I particularly remember, but I got several essays on that theme and—

Q. "That theme" being drug use?

A. Drug use. Drug use, yes. Talking about drug use. And these were essays that they handed [89] in to me that they knew I was going to read and that I was going to grade.

Q. And did you notice any behavioral changes in that late eighties period?

A. I noticed tremendous behavioral changes.

Q. What kind of things did you see?

A. As I said before, I noticed behaviors that were extremely erratic and gross. I had a fifth period class and—

Q. Fifth period after lunch?

A. Yes. Directly after lunch. And students would come back from that class and it was extremely difficult for me to control that class in those particular years.

I remember one instance I think there were 23 or 24 students in the room and a student sat at the back singing "Jesus Loves Me" at the top of his voice.

Q. That was rather unusual?

A. I've never experienced anything like that.

Q. Did you go talk to the student?

A. I talked to the student. It was kind of wild, his behavior, kind of dancing around in the back of the room, and I said—tried to talk to [90] him and he said, "well, I'm just high on life," and tried to calm him down. There was no way. So I wrote a disciplinary referral and—to the office and he was taken from my class, but I don't remember if he was suspended for two days. I can't remember. But I did get him back in class after that.

Q. Did you notice any other types of odd behavior of students in class, for instance, writing inappropriate language?

A. Yes. There was a lot of talk, as I said, about the "Party Till You Puke" thing, the drugs. They didn't mean to overhear it, but it just went on and I did hear it.

There was more use of profanity. I remember one specific incident, and this was in a fifth period class also, where a student came into the classroom, a class of boys and girls, and marched into the classroom and sat down at his desk and looked over at a girl next to him and at the top of his lungs basically in front of all my students shouted, "suck my dick." And this kind of behavior has never happened to me before in my teaching. And these kinds of comments—

Q. And did you talk to that particular [91] student about the comment?

A. Absolutely. I told him to pick up his books and I called the office and there was a disciplinary referral. I believe he was suspended from my class for three days. But he also came back to my class.

Q. Have you ever heard a term "drug cartel" referred to in the school?

A. Yes.

Q. Can you tell the court what that referred to?

A. There's a group of students who bragged about their drug use in their essays and I had all these students in my class. They were student athletes, who talked about how cruel it was to use drugs and alcohol, who in a sense intimidated other students. They would walk down the hall and I would stand right outside my classroom and they would shout and bang their heads into the lockers as hard as they could, they would butt heads with each other. They would be real loud.

Sometimes in the classroom I would have—trying to calm them down. There was such a hostile atmosphere toward me that I just had a really difficult time. It bothered me terribly [92] because I thought what a difference for 15 years I was in control of my classroom, I did not have these kinds of problems. Why is this happening? Why can't I deal with it? And I had to resort increasingly to having them removed from my classroom because I couldn't deal with them in the classroom.

Q. Did you personally participate in any educational efforts to remove drug education prior to the time the district adopted the drug policy?

A. Yes. I'm a drama teacher and during—I think it was—I'm unclear of the years here. I think it was either '87-88 or '88-89. I'm sorry, I can't remember the exact date.

Q. That's all right.

A. But it was during the time that we had the drug prevention month. And I had a drama class and there was a play called "The Attic" that Hillsboro High School had put on and it portrayed the lives of 11 or 12 teenage addicts and what happened to them. And the drama class discussed it and said they would really like to put on this performance as part of the drug education awareness.

And so we practiced it and we performed [93] it five or six times for the high school in small groups and we also performed it at the 7th and 8th grade level.

Q. And why did you select that particular day?

A. It was a joint decision by me and my students. They had heard of the play. I had one student who was student director and we discussed it and they felt that they wanted to have some kind of involvement on their level of bringing the consequences of the drug use to their peers.

There were other speakers coming in from the outside and they wanted to participate on a personal level in letting their friends and their peers know what drug use could do.

Q. And from your personal observation were these efforts effective in curbing the drug abuse in the school?

A. The discipline problems that I was having in my classroom didn't change after that month. There was no change. I remember we had a series of four days and there was something that hit the students every day, and the Friday after those—that was over, five, I don't know the exact number, four or five student athletes skipped school and [94] went to a parent's house and used drugs

and alcohol and they were—the police raided that. That was during school. So that happened immediately after this whole months of education.

Q. Is it fair to say it didn't appear effective in your opinion?

A. I didn't see that it was effective.

Q. Let's turn to the current school year, 1991-'92. Have you noticed any difference in the disciplinary referrals from your class to the principal?

A. I've had no disciplinary referrals at all.

Q. After the adoption of the policy did you notice any difference in disciplinary referrals between that and the current year?

A. Yes, I did. Last year I think I had two disciplinary referrals and the first year that the drug testing was in effect, I can't remember exactly, but I would say no. Maybe one to three, something like that.

Q. Has the excessive drug talk stopped in your class?

A. I've not heard any drug talk in my class this year. Maybe a bit at the beginning of last [95] year. Nothing this year.

Q. How about the classrooms, any difference between when the policy was adopted in this behavior?

A. I don't detect the hostility. I'm able to establish a rapport with my students, have the kind of class atmosphere where they respect each other and me, and I'm able to teach them the kind of environment that I was able to teach in, as I said, those first 15 or so years before this late eighties and I thought everything—I could not understand what was happening. I—I didn't—I didn't change my teaching style. It was so severe in the year of '88-89 that I was seriously considering not remaining in teaching because I felt that I could not reach my students.

I could add that my teaching had been successful. I was a master teacher. I received merit pay several times

from the district. But I felt that I could not continue because I could not reach a great many of my students.

MR. MULLMAN: Nothing further.

* * * *

[97] CROSS-EXAMINATION

* * * *

Q. So again you could be seeing the benefit now of all the work you did back then?

A. I can't—I suppose that's possible.

Q. Really you have no reason—I mean, you can't say for certain what is the cause of the current situation?

A. My observation was that the behavior problems that I had were severe during those two years and after they did not change after the education, they changed drastically after drug testing was implemented.

Q. You talked about some essays that the students wrote that talked about drug use apparently.

A. Yes.

Q. Do you have any—you don't know for sure whether any of those essays are true, do you?

THE COURT: Any of those what?

MR. CHRIST: If those essays were true.

THE COURT: Oh, oh, okay.

THE WITNESS: Only in that the students told me they were true.

Q. (BY MR. CHRIST) These students, was there only one?

[98] A. No.

Q. How many students are you talking about?

A. Probably I would guess—this is an estimated guess: Eight or nine.

Q. Hoy many students have you taught since 1989? Just an estimate.

A. Probably have about 90 students per year.

Q. The drug cartel, how many students were involved in that as far as you could tell?

A. I would identify the leaders of that group, the role models, probably seven to ten.

Q. Did you ever actually ever see any of them taking drugs or just talking about it?

A. I never observed them taking drugs.

MR. CHRIST: That's it, Your Honor.

MR. MULLMAN: Nothing further, Your Honor.

THE COURT: You may step down.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DIRECT- AND CROSS-EXAMINATION OF RONALD SVENSON,
Vernonia High School Teacher, Wrestling Coach and Former Vernonia High School Football Coach

* * * *

[104] DIRECT EXAMINATION

* * * *

Q. Now over your 11 years with the district as a coach and as a teacher, have you had the opportunity to observe any patterns of students use of illegal drugs and alcohol?

A. Yes.

Q. Would you tell us what you've observed?

A. When I came to Vernonia in 1981 I was really impressed with the spirit, the lack of drug use, having moved from an area that was—drug use was rampant in Southern Oregon. The—over that began to erode. Beginning in about '85 you would hear isolated rumors about kids on the teams doing drugs.

It—when I was an assistant coach the head coach was called in and I believe it was in the football season of '85 and apprised of the fact that parents called and said that some of their sons had—that other kids on the team had done drugs on a road trip. That was the first time that [105] we had really been confronted.

After that we began to see—maybe opened our eyes and so we began to look, and we began to see behaviors that as we became better trained and read materials, you

know, appeared to us to be not a normal behavior to the head coach and I at that time.

Q. This is the football coach?

A. Yes.

Q. How did these things come to your attention?

A. As I said, the first instance was kids on the team had told their parents that some kids were doing drugs on a road trip at a restaurant when we were eating. After that we—you know, we heard things that kids would come and tell us that this is what they heard, you hear kids talking. In particlular, after seasons were over when kids felt you no longer had the—the authority to remove them from the team, "oh, yeah, man, we were so blasted, you know," that was '86, '87.

We had a couple instances, basketball team where kids were drinking on a bus coming back from a trip. They were disciplined. That was in what, I believe '86. We had another instance in [106] track where students were—stole some beer at a Mini-Mart or something on a road trip. Were removed from the track team because of it. That—I believe that was in the spring of '87.

We—it began to grow. Began to see more—more athletes across the street from the school in the little restaurant being involved in this thing, in this group. And then you'd hear them talk about it. You know, we had team dinners at our house and you couldn't believe the same kids, you know, would come to your house and then be polite and then you'd see them four days later in school and their behavior would be radically different.

So it was kind of like an escalating thing. It just continued to seem to grow and you could almost weekly see more kids getting into this pool, so to speak.

* * * *

[110] Q. (By MR. MULLMAN) In 1989 did your wrestling team have an opportunity to travel to Madras, Oregon?

A. Yes, we did.

Q. What was the purpose of that trip?

A. To participate in a district 1A wrestling tournament that qualifies wreslers to go to the state tournament.

Q. Did any of your wrestlers get injured in that trip?

A. Yes.

Q. Tell us a little bit about the injury.

A. Well, we had a boy wrestling in the district finals who had qualified the year before to go to state. Only the top two kids in each weight class qualified to go to to the state tournament. He was a very good wrestler, a tough athlete. Had been extremely competitive. He shot [111] a take-down in the first 15 seconds of the district finals. Went—instead of a normal reaction, went to his hands and knees and stayed on his hands and knees. His opponent cross-faced him, went to what we call a two-on-one arm bind, the kid didn't react, he didn't do anything. He just stayed in that position. The kid hammered across him and pulled his elbow up in this (demonstrating) manner. It's a move that we've practiced probably close to a thousand times over the years that that boy participated.

He was severely injured. Had to go—he didn't get to go to the state tournament because of that. He had to go to the doctor. He had several kinds of injuries in the sternum area with collar bones connected to the sternum, several months before he could function normally with his arms.

Q. And was there any reason to suspect that students who were participating were under the influence of some type of drug?

A. That night I took him—when we took him back to the motel, iced him up, okay, the next morning I got up, went down to his room to see how he was doing. It was 11 o'clock when we got back from the motel. When I walked into the room the [112] smell of marijuana enclosed you and I—there were no doubt somebody in the room was smoking marijuana. And I went to get my assistant coach to verify the existence.

There was—and I—by the time we got back, the room had been sprayed with what had to be a mixture of every

aftershave lotion and hair spray and deodorant that those kids could find. There were four kids to a room.

As I looked back on the injury later that afternoon on the way home, it's a long bus ride, I thought the kid didn't react like he had reacted a hundred times in the past. There was no way of particularly proving at that point in time whether he was under the influence. Certainly a strong suspicion.

Q. And have you ever observed any football game films where you got that same kind of strong suspicion that something was wrong?

A. Yes. You practice certain situations over and over in football to prevent injuries, to the kids to react to make—you know, win ball games, to protect themselves. That's my first rule when I coach football was to teach the kids to protect themselves. And during this period of time [113] there would be situations where I was looking at the film and the kid would get an ankle rolled on, you know, opposing player would come up to block him and get to his ankles and the kid would get a sprained ankle.

And I'd watch it and I'd think why didn't he react? I mean, it's just like, you know, you watch, you say to yourself we've drilled on that particular thing a hundred times a week and the kid wouldn't react. And not always were they injured, but it was a situation where they just didn't react in the manner that they would normally react, just as athletes—as people walking down the street would react.

Q. Did the wrestler ultimately tell you that he had been under the influence?

MR. CHRIST: Your Honor, hearsay.

THE COURT: Sustained.

Q. (BY MR. MULLMAN) In response to your observations of these films and your perception of the wrestling, did you decide to do anything about what you perceived as a problem in Vernonia?

A. Not just as a result of that. They were the—let's say the culmination, the point at which I said we're

losing these kids, we had to do [114] something, we have to try something different than we've been trying.

Could I go back to an experience that I had earlier in coaching?

Q. Sure.

A. Okay. In November of 1977 I was teaching at—coaching at Glendale High School, and on the girls' volleyball team had a girl that was extremely popular in school, and was rather heavyset. We had our awards banquet on a Tuesday night. She got the award as the most inspirational volleyball player.

She went to a party, a going-away party for a girl that was moving the next day. Drank about one and a half beers and died of a heart attack in the middle of the party. The evidence about her death is that she had been using speed, diet pills that she had—that she had gotten from an aunt, unbeknownst even to the aunt she was taking them. The alcohol and the amphetamine reacted, she died, you know, 30 kids standing around.

The second hardest thing I ever had to do in teaching was to sit in first period the next day when most of those kids were there in the class. I [115] have no training to deal with that situation as far as how you handle grief. But it alarmed me and, you know, I just read on my own then about the reactions of different drugs ever since the girl died. And when—when these things began to occur and the statements by kids, especially about the use of speed, and I started a series of discussions with Mr. Aultman and I said, well, what—you know, what can we do to drive home the fact that these drugs are dangerous. You know, it's not the kids that are the enemy, it's the drug.

Q. About when did these conversations with Mr. Aultman begin?

A. Probably occasionally—by that I mean once every three or four months in 1987. More often than that in the spring of '88. By the—by February of '89 once every two weeks or so. And he was extremely reluctant

to talk about drug testing. We saw the article from Hawkins, Texas, and so we discussed that also.

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[118] Q. (BY MR. MULLMAN) I don't care what other people told you. I'm asking you what did you decide to do in particular?

A. I decided to do what I could to institute a mandatory drug testing policy at Vernonia—at the Vernonia school district.

Q. What did you do?

A. I talked to Mr. Aultman. As he stated, we had had a discussion at the faculty meeting over the issue. I said I will be more than happy to do the legwork to find out if there are any cases that have been upheld so that we can do this. He gave me information to spend a hundred dollars or so on phone calls to track down information.

I called *Time Magazine* in New York City to get the phone—the names from Hawkins Texas because *The Oregonian* hadn't kept a copy. *Time Magazine*, as I understand at that time it was an insert. I called the superintendent of Hawkins School District, talked with Mike on the phone, felt uncomfortable at some points. I felt that education had failed, everything I'd done in my life that I believed in didn't work—

Q. Did you get a copy of the Hawkins policy?

A. Yes. I talked to him—I asked him at the time, I said did you—has this gone to court, because it seemed rather broad. They tested everyone—

Q The entire student body?

A. Everybody that was in any form of extracurricular activity, including leadership and so on. My concern wasn't that somebody in leadership was going to get hurt or, you know, have these health problems, my concern was kids on the football and wrestling teams weren't reacting and, you know, they were getting hurt.

I—I asked him if there were any cases that had been taken to court because theirs had not been. He said

yes, there was a case in Indiana that had just been settled in late 1988, Tippecanoe County in Indiana. And I said—asked him if he could provide me with materials. He said he would [120] try to do that. He then sent me a copy of their program from Hawkins.

Q. Did you also get materials from the Tippecanoe—

A. Yes, a few months later.

Q. And using those materials, what did you do?

A. I worked in conjunction with Mr. Krost (PH), who was our athletic director at that time, and Mr. Aultman. Through the community we came up with the policy that we now have.

Once we received the Tippecanoe information, the court in Indiana had made it abundantly apparent that there was no constitutional basis to be testing kids from leadership or from the band, that it wouldn't fly, you know, our goal was to protect our athletes. That's—that's where our major concern was. Therefore, the case in Indiana seemed to fit better than the program at Hawkins, so we made some changes in what we had proposed.

* * * *

[128] Q. (BY MR. MULLMAN) Mr. Svenson, we had just completed, I think, at the break discussing the diagram of the locker room. What I would like you to do now, is turn to the Big Elk. There was some testimony about that.

Did you during the 1988 school year have occasion to have members of the Big Elk in your particular classroom?

A. Yes.

Q. And there's been some testimony that there were eight or nine, perhaps as many as ten [129] members of that. Is that your recollection?

A. The Big Elk was—it wasn't like a club of dues and stuff, it was—nobody demonstrated a call, you know, the mating call.

Q. I don't believe you need to do that.

A. There were probably ten or so kids that were the core of what became a group of approximately 30 to 35 kids that were—would walk down the hall and greet each other with this obnoxious greeting.

Q. And these individuals, were some of those individuals in the Big Elk students athletes?

A. I can only think of one that wasn't.

Q. And what type of behavior did you observe of these students?

A. In my classroom?

Q. Yes.

A. I had these students in sixth period U.S. History class. These are—they're sitting in the classroom now and would be talking about let's say the Holocaust, as an example, because I remember this incident specifically. And these two kids started (demonstrating) laughing. Just burst out laughing.

I thought maybe—I thought maybe had [130] done something, so I stopped and said, "what's so funny?" "Nothing." So I go on and that pattern was—that pattern was repeated two or three times that day. I took the kids out. You know, I tried in all my teaching career of 23 years to not have to send kids to the office. So, you know, I took them out on the porch behind my classroom and just talked to them and said, "this is not appropriate. You can't just burst out laughing at a—you know, these kinds of issues."

Then we come back in the class. Other kids in the group would then—as we're trying to discuss this or whatever would start just almost yelling at these kids, you know, about different—different things.

This giggling between these two kids went on—off and on for two or three months. It was—the—then, you know, there were a couple of other kids that would come into class four days out of five with no problem, and then all of a sudden it would be just a—you know, like I came in one day, I walked in my classroom and a kid was

laying underneath three desks. You know, and I said, "what are you doing?" "I was just taking a nap, man."

* * * *

[131] Q. Did you notice that your disciplinary referrals increased in the '87-88 period?

A. Mine did, yes.

Q. In your own classdoom?

A. Yes.

Q. You testified earlier that one of the reasons that you wanted to adopt drug testing policies regarding safety—

MR. MULLMAN: And I apologize, Your Honor, I'm not sure I covered this. I want to make sure I did.

Q. (BY MR. MULLMAN) What concerns with [132] safety did you have for those athletes?

A. First and foremost I think anybody that coached at that period of time had to be influenced by the death of Len Bias, the basketball student at the University of Maryland and Don Rogers a football player with the Cleveland Browns who suffered a heart attacks from overdoses of cocaine.

I was concerned that kids would be using amphetamines and they'd get hurt and not—you know, not be able to recognize it and play beyond what they could—you know, normally you can play football in some amount of pain, but amphetamines may mask like a knee injury on the field and the kid may not feel the full effect of it and continue to play and injure it worse.

I had an almost fanatical fear of a kid being hurt, being taken to the hospital, refusing to admit that he was using a certain—I'll say speed, and being injected with pain killers or whatever and having a reaction to it. Those kinds of concerns. I was concerned because you just—I don't know, I guess because I want the kids to use the athletic program to—as a way to get through being a teenager and have in Vernonia especially have something to do, but get through it safely.

[133] I don't—you know, I don't want any kids to emerge from our program not being able to function and those kinds of concerns.

Q. Were you concerned about the safety of teammates and opponents?

A. In a sense that—that the—if a student was using drugs and playing in particular—in particular football and wrestling, you could—there is a chance that kids could go outside the rules of the game and create injury situations to opponents or come flying into a pile in football for example with his head down and hit a teammate in the back. Those kinds of things. I have to say that that concern was there, but it wasn't the primary concern. My primary concern was for each individual's kid's own protection.

Q. From your experience is there a difference in the pressures between, say, interscholastic athletics and say for instance the P.E. class?

A. Yeah. There's no real comparison between P.E. classes and interscholastic athletics in terms of, you know, for example pressures on the kids to perform. If a boy comes into a P.E. class, for example, in my weight training class and says he's [134] not feeling—you know, feeling well, he has a strained muscle in his back or something, he doesn't participate and usually they will tell you that.

Kids want to play in games and oftentimes they won't tell a coach when they're hurt. And there's that pressure. The workouts themselves are—are much, much more strenuous. First of all, in a high school P.E. class the actual activity length of time by—you know, by dressing down and having to shower and so on, the maximum time is 33 to 35 minutes of exercise, and that includes—that would include a period of time to stretch and warm up.

In wrestling, for example, when kids use—use the idea that they determine the physical difficulty of the practice by the number of pounds they lose, they sweat off during

a practice, they have a two-pound practice or three-pound practice, or once in a while a four- or five-pound practice, depending on the kid. And there's just—there's no pressure, for example, in teaching a class. There's no pressure. Nobody says you know, "did you win?"

You know, you don't go home on Friday [135] afternoon after classes and say, "did you win?" And the kids aren't asked when they come out of P.E. class, "did you win today?" You know. I mean, there's that kind of competitive situation.

Q. Prior to imposing this drug policy did you try other educational programs to reduce drugs in the school system?

A. Yes.

Q. What did you do?

A. Well, I teach modern problems class which is a class that's dsigned to deal with whatever problems the kids find important. So we dealt with the problem of drugs. You know, we discussed the health aspect, the social aspect, what pressures were put on kids to do drugs, was their peer pressure. You know, those kinds of things.

I've done the reports, the kids have researched the drug, effects of the drugs, we looked at movies. We participated—my student leadership class participated in the month long program we talked about. The—this—we were sort of the climax of the four-day thing in the spring right before spring vacation of '88. My student council, we shut off the lights in the gym.

The student council kids came in one at a [136] time with a flashlight under their face, you know, with their faces in white and read off the statistic about, you know, I'm number—we talked about the number of people killed by drunk drivers in the last 20 years and kids would say, "I'm number 5,102, I was driving to the prom," so on, so forth, you know. Had the lights out and just the flashlights.

The student council kids totally forgot about the assembly. However, the next day five of our best sopho-

more athletes skipped school and went to one of their kids' houses and were arrested for drinking and using marijuana.

Q. Now, this month-long program culminating in the four-day event—there's some confusion about the date. Are you fairly certain about when that was?

A. It was when the group that had been—you know, Big Elk group, it's when they were sophomores. They graduated in 1990. So they were juniors in '88-89, so they would have been sophomores in '87-88, yes.

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[139] CROSS-EXAMINATION

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Q. Are you close enough to hear the sound of urination?

A. Our locker room sometimes because of echoes from the gym and so on, so forth, sometimes you would be very difficult to hear it. If there was no P.E. class or any other activity in the gym or anywhere, I could hear them probably if I was to listen close.

Q. Have you caught anyone attempting to cheat?

A. Have I personally?

Q. Yeah.

A. No.

Q. You would agree, wouldn't you, that the risk of injury is inherent in all sports, isn't it?

A. Yes.

Q. And the degree of risk depends on sports?

A. Yes.

Q. It's greater risk for contact sports than for non-contact sports?

A. Yes.

Q. Now, you have four non-contact sports in the district, don't you; golf, volleyball, track [140] and cross country?

A. I believe that's correct.

Q. So really what you're concerned about is wrestling and football?

A. No. What I'm concerned about is the safety of every single kid that participates in athletics.

Q. But the risk is greatest in those two sports, isn't it?

A. Yes.

Q. You mentioned two athletes who died, you believe, from cocaine overdose. Who were those?

A. Those—to say that I believe they died from cocaine overdose makes it sound like that was my opinion. The autopsy reports on both Len Bias and Don Rogers were published in every newspaper in the country saying yes, they died from heart failure caused by an overdose of cocaine.

Q. Len Bias was a basketball player?

A. From the University of Maryland, yes.

Q. Don Rogers, what was his—

A. He was a defensive back for the Cleveland Browns.

Q. Neither one of them died on the playing field, did they?

[141] A. No, they did not.

Q. You talked a little about the educational program. That was tried before the drug testing program?

A. Yes.

Q. You didn't see immediate results apparently?

A. No.

Q. Do you expect immediate results when you teach students something?

A. In areas where their health, immediate health is at risk, you could anticipate that after a period of weeks that there would be some indication, yes.

Q. Well, takes time to change behavior, doesn't it?

A. That depends on the behavior, I believe.

Q. Well, things seem better now than before, correct?

A. For who?

Q. For you as a teacher and coach?

A. In what manner do you mean?

Q. Student behavior, deportment.

A. Yes.

Q. And that could be the result of the seeds [142] that you sowed back in the education program?

A. Those kids that are in my classes now were not in those education programs.

Q. Maybe their older brothers and sisters were?

A. Some of them were, yes.

Q. Education is a long-term process, isn't it?

A. Yes.

Q. I guess I sense that you feel like you failed the educational mission when you adopted the drug testing policy, is that fair?

A. I don't feel that I failed. I felt that myself and my colleagues did everything educationally that we could find to do to change the behavior of the students. I believe and I believe today that the drugs mask the intellect of the person. And I don't think that you can educate people as long as they're under the influence of drugs. I don't think that you can keep them safe. I don't think that you can keep them healthy.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF DEFENDANT'S TRIAL EXHIBIT 106—
Perpetuation Deposition of Robert L. DuPont, M.D., Expert Witness for Defendant

* * * *

[37] Q. In your opinion, would you expect that teachers and coaches and administration staff in a high school or a middle school could effectively observe students and determine which ones were under type-two impairment for marijuana use?

A. No. In fact they'd even have some trouble with type-one because they see such a wide swing of behavior. Adolescents are characteristic for giving a lot of behavior, including mood swings and unpredictability, and all kinds of things. So it becomes even difficult to identify type-one impairment among adolescents because they're so all over the place. But type two, they'd have no possibility of doing that. So I think the fact is that even if they were specially trained they would miss 90 percent, more than 90 percent of the impairment caused by drugs and alcohol.

Q. In the drug-abuse treatment field, what is the standard for determining impairment among patients?

A. The only standard is the drug test. I know of no other way that anybody who—counselors or—who counsels or treats drug addicts could do it [38] without a drug test. They would never, in my experience, use observation as the basis. And these are people that are known to be drug addicts. You think about how different that is from a school situation where you don't know the person is a drug addict. You see them in a sea of

faces. And here's a counselor who knows this person is a drug addict and still can't tell whether the person is using or not. And that's why they do the drug test.

* * * *

[45] Q. What affect does school leaders' or student leaders' drug use have upon this progression on other students?

A. Well, within—I think this is true for all human populations, but it's particularly true in the middle school and high school area—and that is that the definition of what's desirable, the [46] definition of how you're a winner, is made on the basis of the status of the individual in the peer group. And the people who are at the top of that status hierarchy are the ones whose behavior is going to be emulated by the other students. So that the leaders play a very powerful role in terms of shaping the behavior of large numbers of students in the classes. And what they do about drugs makes an enormous difference about what other kids are going to do who are watching them and making up their minds about what they want to do.

Q. Doctor, are you generally familiar with kinds of interscholastic athletic events that middle school and high school students participate in?

A. Yes, I am.

Q. Have you observed middle school and high school interscholastic athletic events?

A. Yes, I have.

Q. Are you generally familar with the risks and physical stresses associated with interscholastic athletics for middle school and high school students?

A. Yes, I am.

Q. Doctor, do you have an opinion of whether students who participate on interscholastic athletic teams in the middle school and high school level who [47] use drugs are at a greater risk of injury to themselves or to others than those students who do not use drugs?

A. Yes, I have an opinion.

Q. What is that opinion?

A. That they are a substantially greater risk.

Q. What is the basis of your opinion?

A. There has been an enormous amount of research on accidents and injuries in large numbers of contexts, including studies of people's behavior when they have been given drugs, to watch how they behave. All of the elements that go into having an accident occur have been studied in laboratory settings to demonstrate that the drug experience is highly correlated—with drug intoxication impairment—is highly correlated with accidents of all kinds. So the accidents associated with athletics are not different in terms of the mental capabilities required to avoid the accidents or the impairments that promote the accidents than any other sort of accident.

And I just would call your attention to one particular study that I think is very compelling in the state of Maryland. The shock trauma unit—that's, of course, where my office is in Maryland—[48] studied 123 consecutive people who were brought there after accidents, injuries and accidents of all kinds, vehicular accidents and any other kind of accident, accidents in the home and biking and everything, every kind of accident in the state, and it was surprising to many people that 35 percent of the people had blood levels of marijuana. Now, unlike a urine level, a blood level means that they'd used very recently before the accident, and that was higher than the percentage who had used alcohol. The alcohol percentage was 33 percent. So that was pretty powerful evidence.

Other studies have shown very high correlation with cocaine in accidents. I don't know of any studies specifically of athletes generally as a group, or of high school athletes, but all the elements that go into the risk of an injury and an accident in an athletic context are present in every other kind of human activity that has been clearly shown that drug use is a major risk factor in those situations. That's the reason that safety is one of the two

principle indicators for drug tests is because of the connection between drugs and accidents.

Q. And how is it that drug use increases these [49] risks?

A. It leads people to take risks. It leads people to be careless. It leads people not to follow instructions to reduce the risks. So that people are impulsive, careless; they're operating outside of the guidelines that they have learned and, therefore, increase their probability that they're going to have an injury.

Q. How would a middle school student who's under marijuana impairment be at a greater risk of injury while participating in football, for example?

A. The person would not be—if they were trained, for example, to tackle above the waist to try to reduce injury, they might go for an easy tackle and go after the other person's knees. They might use a blocking technique that they were specifically trained was a risk to the other person and use it anyhow. They might be involved in using a technique in terms of their own behavior that would put them at risk of a head injury or spinal cord injury or some other kind of injury.

Q. So the risks associated with drug use to high school and middle-school athletes is not only to themselves, but to those other students who are on the athletic field or the practice in the gymnasium [50] with them; is that correct?

A. That's correct. And I think it's very important to understand—this is a general statement about drug problems, including accidents—that one of the concerns is that somehow the drug user is, himself, the only victim of his drug use. One of the myths about drug problems, including accidents, is that the drug user is only risking his own health or safety, and this is clearly not the case. The consequences of the impairment of drug use are shared by everyone who shares the environment in which the drug-impaired person is, and that very much includes the athletic field where the body is being pushed to the limits.

That's what competitive athletics is all about. And where there is clearly a substantial risk, athletes have injuries. It's a ubiquitous aspect of athletic competition is injuries. And a lot of energy is devoted to training athletes how to avoid injury to themselves and other people in the—on the playing field. And drug use is—undermines that. Drug use takes away the protections that exist, not only for the individual himself, but for the other people with whom he shares that practice field.

Q. Are you generally familiar with the types of [51] athletic injuries that are common in middle schools and high school interscholastic sports?

A. Yes, I am. And I think it's important to know that those are the major—by far the biggest amount of injuries—largest amount of injuries related to sports, because so many more people are involved in the middle school and high school athletics.

If you're talking about sport safety, where the action is is not at the professional or the college level but it's at the middle school and the high school. The intensity is very high. The training is much less than it is at the college and professional level, and the numbers of people involved, including the injuries, are so much greater. So I think if one is concerned about reducing injuries in sports generally, and I think everybody in sports medicine is, the action is in the middle school and high school population.

Q. How would drug use affect a student athlete's perception of an injury he or she may have sustained out on the volleyball court, for instance?

A. The person is very likely to play even with the injury and be oblivious of it, if the person is impaired with drug—by drug use.

[52] Q. Are there other effects, for instance, of cocaine or amphetamines that an athlete who is engaged in some activity at a high level should be concerned about?

A. Other—say that again.

Q. Are there other—what are other possible effects of cocaine use on an athlete—

A. Oh.

Q. —who's engaging in a strenuous activity?

A. Remember I was talking about the Len Bias example. He wasn't on the athletic field when he died, but that would be an example of the sort of thing. Cocaine, in particular, because of its effect on the heart, has an unpredictable effect, and it does raise a substantial risk for cardiac arrest for—and a fatal arrhythmia. So that cocaine in particular is a risk, not just in terms of playing through pain or not attending to the training that the person has, but also in terms of the heart danger because the athletics itself often raises—I mean, does always raise the heart rate in competitive athletics to high levels. And you add to that the unpredictable effect of cocaine and you have a very dangerous combination.

Q. If a student has used cocaine while [53] participating in an athletic event, for instance, a handful of times, does that necessarily mean that that student will always—will not encounter any negative effect?

A. No. It could be very unpredictable. It can be the tenth time or the hundredth time that the person has a problem. It doesn't happen right away. In fact, in general, if drug problems happened earlier and more predictably, we wouldn't have the drug use that we do in this society. The way it happens is a delay with respect to any individual, uncertain expression of the negative consequence, and that permits the denial to go on, and that's one of the major factors that perpetuates the drug addiction.

Q. Are these risks associated with drug use for interscholastic student athletes greater than for those students participating in a P.E. class?

A. Well, the level of intensity is enormously different in the typical interscholastic competition from the P.E. class. I think they're in the same family, but the relative risks are very different in terms of the—in terms of

the intensity, the speed, the effort. The duration of the effort is much greater in interscholastic than it is in a P.E. [54] class.

* * * *

[55] Q. In your opinion if a student athlete tests positive for the presence of cocaine, marijuana or amphetamines, is that student under substantial risk of injury to him or herself or to others?

A. Yes, I believe that student is.

MR. POWELL: Sure. Why don't we take a break for about five minutes.

(Recess.)

MR. POWELL: Back on the record.

Q. By MR. POWELL: Doctor, is it the impairment [56] effects that make students who are testing positive for drugs at a greater risk than other students?

A. Yes.

Q. And can you just briefly summarize what those impairment effects are?

A. The main effects have to do with the fact that the student is distracted by what's going on in his or her brain from the drug use. So it has to do with not attending well to whatever else it is that's going on. So it's kind of a distraction problem. But also there are specific problems that happen; for example, the dulling of pain, the difficulty of judging time and distance properly, memory impairments where the person has trouble recalling directions and has trouble recalling and using training. It has to do with risk-taking where a person is prepared to put himself or herself at added risk. So there's a very broad range of impairments that are related to drug use that directly lead to increased risk of accidents in all settings, including student athletics.

Q. Doctor, in your opinion, are there substitutes for drug testing by urinalysis to detect drug impairment among high school student athletes?

A. Well, there has been a very large effort [57] made to find suitable impairment tests. And the basic reason-

ing for this is to find some kind of a screening test that would be the equivalent of the roadside sobriety test to establish probable cause or a reasonable basis for a drug test. So there's been a lot of effort made to look for those sorts of tests. It's a major funding area of the National Institute on Drug Abuse. The simple summary of the report of that work is that, with some interesting exceptions, it has not proven to be of any value. In fact, it actually creates problems when these sorts of tests are introduced, because the tests are not well correlated with drug use or drug-caused impairment; they both under identify drug problems and over identify other problems. So that they end up missing large numbers of people who have drug-caused impairment, and they include people who have no impairment whatsoever in them. They're also extremely subject to subversion. The simple thing that is done with these tests is for the drug users to learn ways to get very low baselines on the tests, and then when they're retested, they don't—even when they're very impaired they still past the test.

So we could talk in some detail—I don't know how much detail you want to get. But the bottom [58] line is that in no setting is there an impairment test of any kind. People talk about the rapid-eye movement test, for example, computer-assisted testing, as well as simpler kind of tests like hand/eye coordination and other kinds of things, and none of these have proved useful in any setting whatsoever as an alternative to the drug test. So in every setting where there's a concern about safety, the drug test is the test that is used.

One other things I should say about some of the tests, the one from the Los Angeles Police Department, which is probably the best of the performance tests, takes 45 minutes for each person. You think about what that means. That means that it takes a trained individual 45 minutes to assess impairment of a single person. Well, that obviously makes it totally unsuitable for any kind of screening purpose. And its application, outside of a

very narrow one in law enforcement, even if it worked, would be—it would be irrelevant.

* * * *

[71]

EXAMINATION

BY MR. CHRIST:

Q. Doctor, have you been to Vernonia?
A. No, I have not.
Q. So you have no firsthand knowledge of the extent of the alleged drug problem there, do you?
A. I do not.
Q. Likewise, you have no firsthand knowledge of the affects of the school's drug testing policy on students there, do you?
A. I do not.
Q. You've never met my client, have you?
A. I have not.
Q. So you have no idea how this policy is affecting my client?
A. I do not. That's correct.
Q. Wouldn't you agree that some risk of injury is inherent in all sports?
A. Oh, yes, sir.
Q. I think you testified that the risk of injury to the athlete or his opponent increases if the athlete is under the influence of illicit drugs; is that correct?
A. Yes, sir.
Q. Wouldn't you agree that the degree of risk [72] depends upon the sport?
A. That's one of the factors.
Q. And the risk would be greater for, say, a contact sport such as football than a non-contact sport such as volleyball, cross-country or track?
A. Correct.
Q. Wouldn't you agree that the risk of injury to your opponent is negligible in a non-contact sport?
A. In general, I think that that's true, yes. Volleyball you're only on your side of the net.

Q. And the risk of injury would be diminished to the athlete himself in a non-contact sport, too?

A. That's right.

Q. Do you know what sports the Vernonia School District offers?

A. I think a fairly broad range, but I don't know exactly which sports.

Q. Well, you say "a broad range." Tell me what sports you think they offer.

A. Basketball, baseball, football, volleyball, track, would be what I would assume, and maybe some others. I don't think they have hockey, for example.

Q. But you don't know for sure what sports they offer?

[73] A. No.

Q. I take it you're a proponent of random drug testing?

A. That's correct.

Q. In fact you advocate random drug testing for everyone, don't you?

A. Well, as much as I can sell it.

Q. Okay. For every segment of the population?

A. Yes, sir.

Q. You've written articles in favor of universal random drug testing?

A. That's correct.

Q. And you believe in that proposition, I take it?

A. I do.

Q. Have you written any papers on the particular subject of illegal drugs in grade school or high school athletics?

A. No, I have not.

Q. You haven't conducted any research on that particular subject, have you?

A. No, I have not.

Q. Are you aware of any one who has?

A. No, I'm not.

Q. I think you testified, if I heard correctly, [74] that the incidents of illicit drug use by grade school and high school students has declined in recent years?

A. Yes, sir.

Q. From a high in the mid-1970s; is that correct?

A. Yes.

Q. That's the national trend?

A. Yes, sir.

Q. And the Oregon trend corresponds?

A. Yes, that's correct.

Q. And you attributed the decline to greater student awareness of the ill effects of drugs?

A. Two factors. That is one, and the other is the decreased tolerance for drug use.

Q. And greater student awareness comes about through education and counseling, doesn't it?

A. Well, a lot of things. I think Len Bias—for example. The biggest increase we ever had in perception of risk was between '86 and '87 for the drug cocaine.

Q. Now, you mentioned Len Bias. He was a basketball player, wasn't he?

A. Yes, sir.

Q. At the University of Maryland?

[75] A. Yep.

Q. He didn't die on the basketball floor, did he?

A. No, he didn't. He died in a dormitory though.

Q. And the cause of his death, do you know?

A. Yes. Cocaine use. It stopped his heart.

Q. Was that due to one large dose or—

A. He'd been using it all through an evening. I don't know how many doses. It wasn't just one though. He died at about 5:00 a.m., to my recollection.

Q. I think you spoke about a perceived progression of drug use among school children.

A. Yes, sir, a stepping-stone hypothesis is what it's called.

Q. That's what we used to refer to as leading to harder drugs?

A. Yes.

Q. That progression is not inexorable, is it?

A. No, that's right. A lot of people don't go to the next step, but each of those steps, and it depends on which step it is, what the percentage is, but many people do not go to the next step.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

EXCERPTS OF PLAINTIFFS' TRIAL EXHIBIT 4— DEFENDANT'S RESPONSE TO PLAINTIFFS' INTERROGATORIES TO DEFENDANT

Defendant Veronia School District hereby responds to Plaintiffs' Interrogatories to Defendant as follows:

INTERROGATORY NO. 1: Has any student been injured while under the influence of drugs in participating in a district-sponsored athletic event? (For each injury, please identify the student who was injured, the date of injury, the sport in which the injury occurred, and the name of the coach who was supervising the sport at the time of the injury?) [sic.]

RESPONSE:

The District has reason to believe that a student was injured while under the influence of drugs while participating in a District-sponsored athletic event, although this was not confirmed through tests. This incident occurred in February 1989 in a wrestling match under Coach Ron Svensen. The student name will not be released as it would result in a violation of the Family Education and Privacy Rights Act (20 U.S.C. § 1232g and ORS 336.195.

INTERROGATORY NO. 2: Has any student caused an injury to another student while the first was under the influence of drugs in participating in a district-sponsored athletic event? (For each injury, please identify the

student who was injured, the date of injury, the sport in which the injury occurred, the name of the coach who was supervising the sport at the time of the injury?) [sic.]

RESPONSE: The District has not been able to confirm through tests or through any other means that any student has caused an injury to another student while the first was under the influence of drugs while participating in a District-sponsored athletic event.

INTERROGATORY NO. 3: Does defendant suspect James Acton of taking drugs? (If so, please specify in detail why it suspects him of taking drugs.)

RESPONSE: No.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

(Title Omitted in Printing)

PARTIAL TRANSCRIPT OF PLAINTIFFS' TRIAL EXHIBIT 5—
Deposition of Ellis Mason, Superintendent of Vernonia School District

* * * *

[7] Q. Do you know what percentage of your students participate in a sports program?
A. No.
Q. Do you have any way of finding out?
A. Sure.
Q. How would you do that?
A. I would ask the building principals to give me a list.
Q. Are you required by state law to offer sports?
A. No.
Q. Do you think participation in sports is an important part of the school experience?
A. Yes.
Q. Does your curriculum included physical education?
A. Yes.
Q. At what grade levels?
A. I believe it starts at kindergarten, K through 8 is required, and we have two required units at the high school.
Q. Then is it an elective beyond those two units?
A. Yeah.
Q. What I mean by that, if a students wants more P.E. they could?
A. If it was available. I am not sure spacewise how much of it is available.

[8] Q. In the P.E. classes do students play some of the sports you previously mentioned?

A. Yes.

Q. Do you require drug testing as a condition of participating in P.E.?

A. No.

Q. Do some of your students drive cars to school?

A. Yes.

Q. Do you have district regulations regarding driving cars to school?

A. I don't believe so.

Q. Do the students who drive cars include both athletes and non-athletes?

A. Yes.

Q. Do some of your students take illegal drugs?

A. I don't know that.

Q. Have you tried to find out?

A. Have I tried to find out? I don't understand.

Q. Have you done anything to try, other than mandatory drug testing, to ascertain whether any of your students are taking drugs illegally?

A. Yes, we have.

Q. What have you done?

A. I believe it was in the fall of 1990 we had a police officer, state police officer, come into the district [9] and train some of the administrators in drug detection, and I believe it was using what they term the Rapid Eye Movement Test.

* * * *

[12] Q. Were the surveys anonymous?

A. Yes, I believe so. To—

MR. POWELL: There is not a question pending. Do you need to clarify your answer?

A. Yes. I think another aspect of what you may or may not be asking is a fact that we have a drug and alcohol program which we do for all the kids. We are required by law to do that. In terms of teaching kids

about the use of drugs and those type of things if that is—I don't know if that is what you are leading at, but we have that program in place.

Q. I will get to that in a moment. What I want to know now is what steps you have undertaken to ascertain that you have a problem. You have described these surveys. Other than the surveys, what have you done?

A. The staff have gone to the building administrators, the building principals, with concerns about things the kids were telling them, observations they have had. Those were not things that, quote, we have done per se, but they have occurred.

Q. Since the fall of 1989 have you determined that any particular student has taken illegal drugs?

A. Yes.

Q. More than one student?

A. I am not sure we have. I believe two confirmed [13] positive—no—yeah, maybe two confirmed positive.

Q. Were those students disciplined?

A. No.

Q. What did you do with those students?

A. According to our policy, the student was given an option of continuing to participate in the sports program, undergoing a weekly urinalysis and getting some type of drug or alcohol counseling, drug counseling. The student chose to do that in one case.

In another case a student came up positive on the first test and refused to take the second test and quit the program voluntarily.

MR. POWELL: I am going to make a quite belated objection, but I took this last series of questions to mean talking about determining drug use through the drug testing program as opposed to other instances where a student may have been caught with drugs or what have you. So to that extent I thought the question was vague, and that is the way I perceived Mr. Mason's answers through that last series. I don't know if you want to clarify that.

Q. I see the confusion. Let's go back over that. Other than through the mandatory drug testing policy, have [14] you determined that any particular students have used drugs illegally?

A. There have been students who have admitted that they have used drugs. And I am not aware that we have ever determined it outside of our drug program.

Q. Through the drug testing program you have determined that two particular students have used drugs?

A. I believe that is correct, yes.

Q. Do you know what percentage of students who play sports take drugs illegally?

A. No.

Q. Have you made any effort to determine that other than through the drug testing program?

A. No.

Q. Do you have any reason to believe that a greater percentage of athletes, student athletes, take drugs than students generally?

A. I think student athletes have reasons to take drugs which other students don't. Whether it is more than or less, I don't know.

Q. What would be those reasons?

A. Well, you get pumped up for a game, play with pain or eliminate pain so they could play.

Q. Do some of your students smoke tobacco?

A. Yes.

* * * *

[21] Q. Do you know if any students avoid random testing entirely for a year?

A. I don't know that. It is mathematically possible.

Q. So there is no guarantee that any particular student will be tested at least once during the year?

A. Yes, they are all tested at least once.

Q. At the first test at the start of the year?

A. Correct.

Q. Now, you said the start of the year. Do you mean the start of the sport season or the start of the academic year?

A. As an example, if a student plays football, which occurs in the fall, they get tested at the first of the academic year, or first of the season. If that same student plays basketball, they are not retested at the beginning of the season. If a new student comes out who has not participated in the fall and comes out for a winter program, they are tested.

Q. The testing is by urinalysis, correct?

A. That is correct.

Q. How is the urine specimen obtained?

A. The students urinate either into a cup or a vial of some sort.

* * * *

[24] Q. Do you know how many tests you do in a year?

A. No.

Q. I believe you said there have only been two positive results since you began.

A. Only two that I believe we have confirmed positive. That is to the best of my recollection.

Q. Do you know what grades those students were in?

A. I believe they were high school students.

MR. CHRIST: Why don't we take a break for a minute and I will see if I have anything else for you.

[Break].

[Student Athlete Drug Policy, EXB. 1, marked]

[Logger Handbook 1991-1992, EXB. 2, marked]

[Memo dated 10-4-89, EXB. 3, marked]

[Student Survey on Fall Sports, EXB. 4, marked].

Q. Mr. Mason, you have listed some of the drugs that you test for, not including marijuana. Do you test for marijuana, in fact?

A. Yes, we do.

Q. Do you test for steroids?

A. No.

Q. Do you test for any performance enhancing drugs, such as steroids?

[25] A. Not that I am aware—I don't know in terms of the physical manifestations of the drugs we test for whether they would be considered performance enhancing.

Q. Drugs specifically designed to enhance athletic performance as opposed to a drug that a particular student might perceive as enhancing his or her performance.

A. The only drug that I am aware of that would be classified as that would be steroids, and we don't test for steroids.

Q. I would like you to identify some exhibits, if you would, please. I am handing you Exhb. No. 1. Do you recognize that?

A. Yes.

Q. Can you tell me what that is, please.

A. This is a Student Athlete Drug Policy.

Q. Is that the current policy of your drug testing policy?

A. Yes, I believe so. Yes.

* * * *

Supreme Court, U.S.
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No. 94-590

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

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QUESTION PRESENTED FOR REVIEW

Whether Vernonia School District 47J's program of drug testing middle and high school student athletes in the absence of individualized suspicion is a constitutionally reasonable "search" under the Fourth Amendment to the United States Constitution?

STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-590

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 23 F.3d 1514 (9th Cir. 1994) and is included in Appendix A to the Petition for a Writ of Certiorari at pages 1a through 75a. The court of appeals' order denying the Vernonia School District's petition for rehearing and rejecting its suggestion for rehearing *en banc* is found in Appendix C to the Petition for a Writ of Certiorari at pages 143a through 144a. The opinion of the United States District Court for the District of Oregon is reported at 796 F.Supp. 1354 (D.Or. 1992) and is included in Appendix B to the Petition for a Writ of Certiorari at pages 76a through 142a.

JURISDICTION

The jurisdiction of this Court to review the judgment and opinion of the court of appeals is by writ of certiorari pursuant to 28 U.S.C. § 1254(1). The opinion and judgment of the court of appeals were filed on May 5, 1994. (Pet. App. A). Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 8, 1994. (Pet. App. C). Petitioner filed its Petition for a Writ of Certiorari on September 30, 1994. This Court granted the Writ of Certiorari on November 28, 1994.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be secured, and the persons or things to be seized.

STATEMENT OF THE CASE

This case arises from the adoption and implementation by Vernonia School District 47J (the "District") of the Student Athlete Drug Policy (the "Policy") allowing the District to conduct urinalysis testing of its elementary and high school student athletes without individualized suspicion. The District did not allow James Acton, a seventh grade student at the District's Washington Grade School, to participate in interscholastic football when he and his parents declined to sign the Policy's consent form required of all interscholastic athletic participants. The parents, as guardians ad litem for James Acton (the "Actons"), initiated this action against the District seeking injunctive and declaratory relief from enforcement of the Policy.

A. Record Evidence

1. *The Community of Vernonia and the Role of Interscholastic Athletics.*

Vernonia, Oregon is a small, isolated logging community of approximately 3,000 residents. (J.A. 19; R. 102).[1] The District employs 42 faculty members and consists of one high school and three grade schools with total enrollment of approximately 690 students. (Pl.Ex. 5 at 5-6). Because of its size and location, the town has few recreational opportunities or organized entertainment programs for elementary and high school students. (J.A. 19-20; R. 102). As a result, community life in general centers around the schools, with interscholastic athletics playing a dominant role. (J.A. 20; R. 101-102). Given the importance of athletics, student athletes are admired within the District's schools and the community. (J.A. 20, 37).

The District offers football, basketball, track, cross country and volleyball starting at the seventh grade level, and wrestling and golf starting at the ninth grade level. (J.A. 43, 64; Pl.Ex. 5 at 6). Between 60 to 65 percent of high school students and approximately 75 percent of elementary students participate in interscholastic athletics. (J.A. 20, 37).

Participation in interscholastic athletic programs is voluntary. (J.A. 33). The District, however, places numerous restrictions on eligibility for its athletic programs. In addition to satisfying the requirements of the Policy, all

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[1] References to the Joint Appendix are denoted as "J.A."; references to the trial transcript are denoted as "R."; and references to the Appendix to the Petition for a Writ of Certiorari are denoted as "Pet. App." All exhibits referred to in Petitioner's brief were received by Order of the district court on April 28, 1992. (J.A. 1). Because no written transcript of the Order was made, reference to Plaintiffs' and Defendant's trial exhibits are denoted as "Pl.Ex." and "Def.Ex.", respectively, followed by the exhibit number and the page number of the exhibit, if any, on which the cited material appears.

students must have a physical examination, proper insurance and written parental consent to participation. (R. 61-62; Pl.Ex. 2 at 30).[2] All athletes must enroll in a minimum number of credited subjects and maintain passing grades in all subjects or lose athletic eligibility for the following nine weeks, with no appeal of such eligibility. (Pl.Ex. 2 at 30). With limited exceptions, all student athletes are required to attend all classes on the day of a practice or contest to participate and must travel to and from contests with the team under the direct supervision of the team's coach. *Id.* In addition, all athletes must comply with any rules of conduct established by the coach and athletic director, including rules related to dress, training hours and related matters. (R. 61-62; Pl.Ex. 2 at 30).

2. *The History of Drug and Disciplinary Problems Within the District Generally.*[3]

Prior to the early 1980s, District schools experienced few disciplinary problems. Drug use was confined to a small "fringe" element of the school population which was generally looked down upon by other students. (J.A. 21). The District prided itself on the lack of a drug problem and its students were considered well behaved. *Id.* A sense of school spirit pervaded the schools. (J.A. 53). During this time, the District experienced only minor disciplinary problems. (J.A. 21). "Disciplinary

[2] James Acton testified that prior to trying out for the football team he underwent a physical examination, which included producing a urine sample. (J.A. 17-18).

[3] The evidence of drug and disciplinary problems in the District was based primarily on first-hand observations of District officials, reports received by District officials from teachers, parents and students, and student conversations which were overheard by District officials. To the extent the evidence was not based on a trial witness' first-hand observation, the testimony was subject to a continuing hearsay objection raised by Respondents. Where such objection was not sustained, evidence not based on personal observation was admitted to show that the District was reasonable in its belief that a drug problem existed. (R. 143-146).

referrals" averaged approximately 40 to 50 a year, with no strong disciplinary problems reported. *Id.*[4]

In the mid-to-late 1980s, however, the District perceived an increase in the use of drugs and alcohol by its students. (J.A. 20-22, 40, 46-47, 53-54). Students were observed sharing and smoking marijuana at a small restaurant near the high school. (J.A. 39-40). Drug paraphernalia, such as marijuana pipes, was confiscated on school grounds. (J.A. 22-23). On one occasion, students admitted to a school official that they had used marijuana. (J.A. 22-24). In classrooms, hallways and at sporting events, teachers overheard students boast about their drug and alcohol use and the fact that school officials could do nothing to prevent it. (J.A. 21, 39-42, 47-48, 54).

The increase in drug and alcohol use coincided with a decline in classroom decorum and an increase in disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals more than doubled from those in the early 1980s to approximately 100 to 110, including several expulsions. (J.A. 21-22). Teachers experienced outbursts of profane language during class, and rude and obscene statements directed at other students. (J.A. 46-48, 59-61). Teachers and administrators felt helpless as students increasingly expressed their attraction to, and vocal defense of, drug use. (J.A. 21-22, 40-41, 45-48). One teacher, who had never experienced classroom discipline problems in the past, considered leaving the profession after 15 years of service because of her frustration in dealing with this new situation. (J.A. 50). Other teachers stated that the blatancy with which students talked about their drug use resulted in hostility and a power struggle between the students and teachers. (J.A. 40, 48).

[4] In a "disciplinary referral," a teacher completes a referral form which states that a student's behavior is unacceptable and describes the particular behavior. (J.A. 41). The form is given to the student, who signs a rebuttal or comment with regard to the discipline. *Id.* It is then sent to the school's principal for appropriate disciplinary action. *Id.*

3. *The History of Drug and Disciplinary Problems Among Student Athletes in Particular.*

School officials also perceived that the leading student athletes were actively involved with the school-wide drug problem and that drug and alcohol use pervaded the District's athletic programs. (J.A. 24-25, 40-41, 53-54, 59-60, 84). School officials knew of several instances of drug and alcohol use by student athletes. For example, five of the high school's best athletes cut classes to hold a party and were arrested for drinking alcohol and using marijuana. (J.A. 49-50, 63-64). On one occasion athletes admitted to a District principal that they had used drugs. (J.A. 22-24). A District coach stated that once athletic seasons were over and student athletes thought the coach no longer had authority over them, the athletes talked about having been "blasted" during the season. (J.A. 54). Athletes were also caught consuming alcohol on a bus trip after a game. *Id.* Other athletes stole alcohol from a store after a track meet. *Id.*

The District also received reports of drug use within the athletic program from teachers, parents and students. Parents learned of drug use on a football trip. (J.A. 53). Four players admitted to the high school football coach that they had used amphetamines. (J.A. 21-23; Pl.Ex. 3 at 1). In addition, "organizations" composed largely of athletes began to form. (J.A. 40, 59-60). Athletes in one such group, called "The Drug Cartel," submitted essays as class assignments glorifying drug use. (J.A. 48). The groups' behavior was typified by certain calling cards such as "head butting" and loud "bugling" calls. (J.A. 40-41, 48).

The District was particularly concerned about the effects of drug use by student athletes because of the risk of serious injuries drug use posed to athletes. (J.A. 24-25, 61-62). During the mid-to-late 1980s the District noticed an increase in the number and severity of injuries to its athletes. (J.A. 39). For example, the high school football and wrestling coach suspected that drug use at an out of town wrestling match contributed to a severe

sternum injury of a wrestler who failed to execute a basic maneuver. (J.A. 54-56). The wrestler lost the normal function of his arms for several months. (J.A. 55). When the coach visited the student's hotel room the day after the injury, the smell of marijuana permeated the area.[5] *Id.* The coach also suspected that drug use affected certain football players, because players at times ignored or forgot well-drilled safety routines and failed to react in a normal manner. (J.A. 56). He expressed a concern that drug use would slow down athletes' reaction time, making them more susceptible to injury. (J.A. 56, 62). He was concerned that drug use would mask the pain of an injury, causing an athlete to continue to play and the injury to worsen. (J.A. 61). The coach also feared that an injured athlete might, for example, be taken to a hospital, refuse to admit that he or she used "speed" and have a harmful reaction to a prescribed pain killer. *Id.*[6]

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[5] The Actons' interrogatory No. 1 and the District's response are as follows:

> INTERROGATORY NO. 1: Has any student been injured while under the influence of drugs in participating in a district-sponsored athletic event? (For each injury, please identify the student who was injured, the date of injury, the sport in which the injury occurred, and the name of the coach who was supervising the sport at the time of the injury?) [sic]
>
> RESPONSE: The District has reason to believe that a student was injured while under the influence of drugs while participating in a District-sponsored athletic event, although this was not confirmed through tests. This incident occurred in February 1989 in a wrestling match under Coach Ron Svensen. The student name will not be released as it would result in a violation of the Family Education and Privacy Rights Act (20 U.S.C. § 1232g and ORS 336.195).

(J.A. 79).

[6] The teacher's testimony in this regard was corroborated by the District's expert witness, Robert L. DuPont, M.D., who testified that student athletes who use drugs, particularly middle- and high-school athletes, face a "substantially greater risk" of injury. (J.A. 70-72).

Dr. DuPont is a psychiatrist specializing in drug abuse and treatment. (Def. Ex. 106 at 6). He was the first director of the

4. *The District's Attempts to Reduce Drug Use Prior to Adopting and Implementing the Policy.*

The District attempted to deter drug and alcohol use through education. Special classes and presentations were held on the effects and addictive nature of drugs. (J.A. 25, 49, 63; R. 61). The District also spent several thousands of dollars to employ well-known speakers to address students on the dangers of drug use. (J.A. 25-26). The Vernonia City Council, after being approached by the District, hired a policeman for two weeks to patrol areas near the high school to deter drug use. (J.A. 22, 25, 34-35).

These efforts failed to achieve any significant impact on the disruptive atmospshere in the District's schools. (J.A. 25-26, 34-35, 49-50, 65-66). For example, the arrests of the five athletes referred to above occurred the day after the presentation of a student play directed at the dangers of drug use. (J.A. 49-50, 63-64). By 1989, District officials considered adopting a drug testing policy. (J.A. 26-27; R. 31-32). According to a District principal, such a policy was the only alternative other than "massive expulsions." (J.A. 26-27; R. 32).

The District investigated possible drug testing programs. (J.A. 26-27; R. 30-32). The District had previously refused to adopt any drug testing program, choosing instead to exhaust other alternatives. (J.A. 27). The District studied testing programs of other school districts and obtained legal opinions regarding such programs. (J.A. 58-59; R. 33-35). The District administration recommended implementation of the Policy after a parent "input night" was held on the topic and the parents in attendance unanimously approved the Policy. (R. 32-33). The School Board approved the Policy for implementation in the fall of 1989. (R. 35-36).

National Institute on Drug Abuse and the second White House "drug czar." *Id.* He was president of the American Council for Drug Education for several years and has been a clinical professor of psychiatry at Georgetown University since 1980. (Def. Ex. 106 at 7).

5. *The District's Drug Testing Policy.*

The purpose of the Policy is non-punitive. (J.A. 7, 27-28). It was designed as a preventative program to keep athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs. (J.A. 7, 27-28, 32). An earlier version of the Policy covered all students who participated in extracurricular activities, but the Policy involved in this case was limited to interscholastic athletics to assure its legality. (J.A. 29-30).

The Policy provides for testing by urinalysis for amphetamines, marijuana and cocaine. (Pl.Ex. 5 at 17; Def.Ex. 109). The Policy does not test for steroids or alcohol. (J.A. 85-86). Other drugs, such as LSD, are only tested for at the request of the District because of the high costs of testing for such drugs. (Pl.Ex. 5 at 17).[7] The identity of a student, however, does not determine the drugs tested for. (Pl.Ex. 5 at 17). To avoid sanctions for a "positive test," students must identify any prescription medications they are taking by providing a copy of the prescription or a doctor's authorization. (J.A. 8).

All students who participate in interscholastic athletics are tested at the beginning of the athletic season. (J.A. 8, 30-31). The student and his or her parents are required to sign a written form consenting to the testing if the student chooses to participate in interscholastic sports. (J.A. 10-11, 16-17; R. 8, Pl.Ex. 5 at 25-26). During the athletic season, athletes are tested randomly. (J.A. 8, 30-31; Pl.Ex. 5 at 20). Once a week, the names of all athletes competing during the particular season are placed in a "pool." (J.A. 30-31; Pl.Ex. 5 at 20). A student draws from the "pool" the names of ten percent of the athletes, who are then tested. Two adult witnesses observe the selection. (J.A. 30-31). The student drawing the names is unaware of who is selected. *Id.* The students

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[7] The cost of the basic test performed by the District is approximately $15. (Pl.Ex. 5 at 23-24).

selected are notified and tested that same day, if possible. (J.A. 31). Testing may occur before or after school, during breaks in class or during class, if the student is permitted to leave. *Id.* The drawn names then go back into the "pool." (Pl.Ex. 5 at 20-21).

A student begins the test by completing a specimen control form which assigns the student a number. (J.A. 42; R. 38). The student then enters an empty locker room with a minitor, who is a male school official for the boys and a female official for the girls. (R. 38). The monitor then opens a packet containing a cup and vial and provides the student with the cup. *Id.*

Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor who is approximately 12 to 15 feet behind the student. (R. 39-40, 138). Although the monitor is in the same room as the male student to assure that no tampering occurs, the monitor is not required to, and does not routinely, watch the student while he produces the sample. (J.A. 31-32; R. 138-139). In fact, the monitor for high school boys testified that he did not stare at the boys while they produced the sample. (R. 138-139). At no time are the students' genitals observable by the monitor. (J.A. 28, 42; R. 124). The monitor can, however, hear the normal sounds of urination. (J.A. 31-32, 64). The procedure for girls differs only in that the sample is produced in an enclosed bathroom stall such that the monitor can hear but not observe the students. (J.A. 42). If a student is unable to produce a sample, he or she is allowed to leave and return when capable of doing so. (J.A. 32). After the sample is produced, it is given to the monitor who transfers the sample to a vial. (R. 38, 40, 124; Pl.Ex 5 at 22). The entire procedure takes approximately five minutes. (J.A. 31).

The samples are sent to an independent testing laboratory which performs a screening and confirmation procedure which tests for amphetamines, cocaine and marijuana. (Pl.Ex. 5 at 17, 24; Def.Ex. 109; Stip. Test. of

R. Velander at 6).[8] The laboratory's procedures are 99.94% accurate. (Stip. Test. of R. Velander at 8). The laboratory personnel trained school officials in implementing and monitoring the testing. (R. 37-38, 124; Stip. Test. of M. Pederson at 3). The District follows strict procedures regarding the chain of custody and access to test results.[9]

The laboratory may only report test results to District personnel authorized to receive the results and requires such personnel to recite a code number to ensure they are so authorized. (Stip. Test. of R. Velander). Test results are first reported to the District superintendent by telephone from the laboratory. (Pl.Ex. at 5 at 22; Stip. Test. of R. Velander). The laboratory is only authorized to mail written reports to the superintendent. (Stip. Test. of R. Velander at 8). The only officials who have access to test results are the superintendent, the District principals and vice-principals, and the District athletic directors. (J.A. 29; Pl.Ex. 5 at 22-23). The records are not kept for more than one year. (Pl.Ex. 5 at 23).

If a tested sample shows the presence of drugs, a second test is administered as soon as possible to confirm the result. (J.A. 8, 32). If the second test is negative, no further action is taken. *Id.* If the second test is positive, the athlete's parents are notified. *Id.* A District principal then conducts a due process hearing with the student and his or her parents where the student is given the option of: (a) participation in an assistance program and weekly urinalysis for six weeks; or (b) suspension from athletics for the remainder of the current season and next athletic

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[8] The parties at trial stipulated to the admissibility of the expert witness statement of Robert Velander, the clinical chemist and systems manager of the laboratory, regarding the laboratory's testing procedures and the reporting of test results.

[9] The student signs and dates the security tape which seals the vial. The vial is assigned a number coinciding with the student's number on the specimen control form. (R. 38; Pl.Ex. 5 at 22). It is then placed in a plastic bag which the student also signs and dates. (R. 38).

season. (J.A. 9, 32). The student is then re-tested prior to the start of the next athletic season for which he or she is eligible. *Id.* A second offense results in a suspension from participation in athletics for the remainder of the current athletic season and the next season for which the athlete is eligible. (J.A. 9).[10] After the third offense, a student is suspended from athletics for the remainder of the current season and the next two athletic seasons. (J.A. 9, 33).[11]

6. Drug and Disciplinary Problems After the Policy.

After adoption of the Policy, District officials noticed a marked change in the problems they had experienced prior to the Policy. (J.A. 41, 50; R. 43-45, 137). Overall, the number of referrals in the year in which the Policy was adopted dropped from approximately 100 to approximately 50. (R. 43). In addition, one athletic director testified that the number of athletic injuries reported to her office decreased after the Policy was adopted. (R. 76). As the court of appeals found: "[e]very teacher that testified noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of the drug culture" since the policy was implemented. 23 F.2d at 1522 (Pet. App. A at 34a; J.A. 41, 50-51; R. 43-44, 137). One teacher also noticed an increase in students' grades. (R. 137).

B. Trial Court Proceedings

This case was initiated in 1991 when Wayne and Judy Acton, as guardians ad litem for James Acton, filed a complaint for declaratory and injunctive relief from en-

[10] Although not stated specifically in the Policy, a District principal testified that after a second offense a student is not automatically suspended from participating but may continue to participate if he or she participates in an assistance program and agrees to weekly testing. (J.A. 32-34).

[11] The superintendent testified that two confirmed positive tests occurred while the Policy was effective. (J.A. 38, 83).

forcement of the Policy. The Complaint alleged that the District's refusal to allow James Acton to participate in the District-sponsored athletic program violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Oregon Constitution. (J.A. 5).[12] The district court had jurisdiction over the Fourth Amendment claim under 28 U.S.C. § 1331 and supplemental jurisdiction over the Oregon constitutional claim under 28 U.S.C. § 1367(a). 23 F.3d at 1517 (Pet. App. A at 10a).

After trial to the court, the district court ruled that the Policy did not violate either the United States or Oregon constitutions, entered an order denying the claims for injunctive and declaratory relief and entered a judgment dismissing the action. 796 F.Supp. at 1368 (Pet. App. 8 at 142a; J.A. 14-15).

Applying a balancing test which weighed James Acton's right to privacy against the District's interest in adopting the program, the court found that the testing program was reasonable. 796 F.Supp. at 1365 (Pet. App. B at 125a). Specifically, the court found that the school demonstrated a "compelling need" for the program. This need was supported by the following factors: (1) that coaches observed unsafe performance by athletes who were under the influence of intoxicants; (2) that District athletes were role models in the community such that deterring their drug use would deter other students' use; (3) that the District considered and unsuccessfully tried several alternative methods of addressing the drug problem before instituting the Policy; (4) that the Policy was limited in scope and narrowly tailored to effectuate the District's objectives; (5) that the District took significant steps to limit the extent of intrusion, such as assuring the confidentiality of results, not disclosing results to criminal

[12] The Actons also alleged that the District lacked statutory authority to adopt and enforce the Policy. (J.A. 5). The district court, however, held that the District had the requisite authority. 796 F. Supp. at 1367 (Pet.App. B at 137a).

authorities, and not using results for suspensions, expulsions or other school disciplinary proceedings; (6) that coaches and school administrators could exercise no discretion under the Policy; and (7) that the Policy was implemented at the middle and high school level where courts should accord deference to school administrators "in matters concerning discipline and maintaining order." 796 F.Supp. at 1363-1365 (Pet. App. B at 115a-125a).

C. Ruling of the Court of Appeals

The Actons appealed to the United States Court of Appeals for the Ninth Circuit which reversed the judgment of the district court and held that the Policy violated the Fourth Amendment as well as Article I, Section 9 of the Oregon Constitution. 23 F.3d at 1526 (Pet. App. A at 59a-60a). The court of appeals found that the district court's findings of fact were not clearly erroneous. 23 F.3d at 1519 (Pet. App. at A at 20a). On the merits, the court of appeals applied a balancing test. It first found that the student athletes' right to privacy was not minimal. 23 F.3d at 1525 (Pet. App. A at 51a-56a). It then concluded that, although the District's interests in preventing unnecessary athletic injuries, reducing the attraction of drugs among other students and improving discipline were "worthy goals," they were not the kind of "exereme dangers and hazards" involved in prior cases which authorized random urinalysis testing. 23 F.3d at 1526 (Pet. App. A at 56a-57a). The court concluded that the District's interest was not "compelling enough" to support such testing. 23 F.3d at 1526 (Pet. App. A at 58a).

SUMMARY OF ARGUMENT

The District's drug testing policy (the "Policy"), requiring students who choose to participate in interscholastic athletics to submit to suspicionless urinalysis, does not violate the Fourth Amendment. The special nature of the school setting has led this Court to hold that certain constitutional rights must be reduced for students. *See, e.g., Goss v. Lopez,* 419 U.S. 565, 582

(1975) (due process); *Ingraham v. Wright,* 430 U.S. 651, 681-682 (1977) (Eighth Amendment). In particular, while students have Fourth Amendment rights in the school setting, those rights are diminished at least to the extent that schools may conduct reasonable searches of students without a warrant or probable cause. *New Jersey v. T.L.O.,* 469 U.S. 325, 340-341 (1985). The issue presented in this case is whether drug testing of student athletes can be reasonable under the Fourth Amendment in the absence of individualized suspicion.

In other cases the Court has found, as it did in the school setting, that neither a warrant nor probable cause is necessary. *See, e.g., O'Connor v. Ortega,* 480 U.S. 709, 722, 725 (public employees); *United States v. Martinez-Fuerte,* 428 U.S. 543, 546 (1976) (border checkpoints). In some of those cases the Court has gone on to hold that searches were reasonable despite the absence of individualized suspicion. *See, e.g., Skinner v. Railway Labor Exec. Assn.,* 489 U.S. 602, 633 (1989); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 679 (1989); *Martinez* at 559-562; *New York v. Burger,* 482 U.S. 691, 700-701 (1987). In those cases, the Court has balanced: (1) the governmental interest in the search; (2) the intrusion on reasonable expectations of privacy; (3) the control on government discretion in conducting the search; and (4) the effectiveness of the search. *See, e.g., Martinez,* 428 U.S. at 559; *Burger,* 482 U.S. at 702. Because the school setting requires deference to the judgment of school officials and protection of the educational environment, *Ingraham v. Wright,* 430 U.S. 651, 681-682 (1977), this flexible standard should also be applied in the school setting and individualized suspicion should not be an essential element of reasonableness for a school search.

Balancing these four factors in this case reveals that the Policy was reasonable and, therefore, constitutional. First, the District had a compelling interest in protecting the

safety of its student athletes and the educational atmosphere of its schools from a pervasive drug problem. Before implementing the Policy the District attempted to stem the drug problem with education and counseling but achieved no discernible reduction in the problem. Second, the Policy adequately restricted or eliminated governmental discretion because it mandated truly random testing and followed an unvarying protocol. Third, the Policy was only a minimal intrusion on the student athletes' reasonable expectations of privacy because students, and especially athletes, are already subject to substantial regulation in the school environment, some of which—like the Policy—are reasonable and necessary safety regulations. Interscholastic sports involve substantial additional intrusions on a student's privacy. Finally, the decision to play sports is entirely voluntary—if a student does not want to be subject to the Policy he or she can opt not to play sports.

The Policy was effective in achieving its purpose. In addition to detecting drug use, drug testing has deterred drug use and thus has met the District's objectives of reducing drug use by student athletes, and, through their example, the entire school population. After the Policy was implemented there was a substantial improvement in school order and discipline.

ARGUMENT

The Fourth Amendment of the United States Constitution, "by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." *Elkins v. United States*, 364 U.S. 206, 213 (1960). The test of reasonableness "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Instead, " '[t]he specific content and incidents of this right must be shaped by the context in which it is asserted.' " *Wyman v. James*, 400 U.S. 309, 318 (1971) *quoting Terry v. Ohio*, 392 U.S. at 1, 9 (1968). "The determination of the standard of reasonableness . . . requires 'balancing the need to search against the invasion which the search entails.' " *New Jersey v. T.L.O.*, 469 U.S. at 325, 337 (1985) (citation omitted). The question presented in this case is whether the urine tests performed on student athletes by the Vernonia School District (the "District"), in the absence of individualized suspicion, are reasonable searches under the Fourth Amendment.[18]

I. THE DISTRICT'S DRUG TESTING PROGRAM IS A CONSTITUTIONALLY REASONABLE SEARCH

A. This Court Has Long Recognized Qualitative Differences Between the Constitutional Remedies to Which Students and Adults Are Entitled. In the School Setting, Students' Constitutional Rights Are Diminished.

Before examining the reasonableness of the District's drug test policy (the "Policy") under the Fourth Amendment, it is important to emphasize the special nature of

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[18] Public school authorities who conduct searches of their students are state actors subject to the limits of the Fourth Amendment. *New Jersey v. T.L.O.*, 469 U.S. at 336-337. Because the collection and testing of urine intrudes upon expectations of privacy that society recognizes as reasonable, urine tests are searches proscribed by the Fourth Amendment. *Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602, 617 (1989).

the public school environment. This Court has traditionally recognized the unique and important role that public schools play in our society. First, public schools are primarily responsible for the education and training of young people and education "is perhaps the most important function of state and local governments." *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1953). Public education, like the police function, " 'fulfill[s] a most fundamental obligation of government to its constituency.' " *Ambach v. Norwick*, 441 U.S. 68, 74 (1979). The state, therefore, has a "compelling interest" in educating and training its young people. *New Jersey v. T.L.O.*, 469 U.S. at 350 (Powell, J., concurring).

Second, public schools are entrusted with the difficult task of preparing students for citizenship. As is noted in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986):

> "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." (citations omitted).

Third, this Court recognizes the substantial interest in maintaining discipline in the classroom and on school grounds and its importance for the education process. *New Jersey v. T.L.O.*, 469 U.S. at 339. The Court in *New Jersey v. T.L.O* noted that in recent years:

> [S]chool disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. *See generally* 1 NIE, U.S. Dept. of Health, Education and Welfare. Violent Schools—Safe Schools: The Safe School Study Report to the Congress (1978). Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision

> of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult.

Id. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." 469 U.S. at 350 (Powell, J., concurring).

Finally, it is important for the courts to defer, whenever possible, to decisions local school authorities make concerning education and maintenance of school discipline. In *Ingraham v. Wright*, 430 U.S. 651, 681-682 (1977), the Court held:

> Assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law.

In *Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968), the Court held:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Similarly, this Court "emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools." *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 507 (1969).

As a result of the unique nature of public education, the Court has consistently recognized some reduction in the constitutional rights of students. Thus, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court acknowledged a student's constitutional right to due process following a disciplinary suspension, but limited that right only to notice and a "rudimentary" hearing. 419 U.S. at 582.

Similarly, in *Ingraham*, the Court declined to extend the Eighth Amendment to prohibit the use of corporal punishment of schoolchildren. In so holding, the Court stated:

> Imposing additional administrative safeguards as a constitutional requirement might reduce that risk [of violating a student's substantive rights] marginally, but would also entail a significant intrusion into an area of primary educational responsibility.

430 U.S. at 682.

Students' First Amendment rights are also significantly reduced. School officials may prohibit the use of lewd and inappropriate speech by students and may impose disciplinary sanctions for speech which disrupts the educational process. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). School officials may also impose reasonable restrictions on the style and content of school newspapers published by journalism students, "so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). Such a standard "is consistent with [the Court's] oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 484 U.S. at 273 (citations omitted).

In *Board of Education, Island Trees Union Free School District No. 26 v. PICO*, 457 U.S. 853 (1982), the Court held that public school boards possess significant authority to determine which books are appropriate for school libraries. School boards may remove certain books from libraries so long as the removal decision "was based solely upon the 'educational suitability' of the books in question. . . ." 457 U.S. at 871.

Similarly, in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969), which is frequently cited for the proposition that students do not "shed their constitutional rights . . . at the schoolhouse gate," 393 U.S. at 506, the Court held:

> [C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

393 U.S. at 513.

In these cases the Court consistently gives deference to legitimate pedagogical concerns and the requirements of appropriate discipline in the operation of the school, and concomitantly reduces the constitutional rights that students can demand in the school setting.

B. This Court Also Treats the School Setting Differently for Purposes of Searches Under the Fourth Amendment, and Holds That Searches in the School Setting Are Reasonable in the Absence of a Warrant or Probable Cause.

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ." *New Jersey v. T.L.O.*, 469 U.S. at 340. "[W]hat is reasonable depends on the context within which a search takes place." 469 U.S. at 337. In *T.L.O.*, this Court held that in the school setting students' Fourth Amendment protections are diminished. 469 U.S. at 340.

In *T.L.O.*, a school official searched a student's purse based on reasonable suspicion that she had been smoking on school grounds, in violation of school rules. After noting that the opening of the student's purse was "undoubtedly a severe violation of subjective expectations of privacy," 469 U.S. at 338, the Court balanced the legitimate expectations of privacy[14] against "the substantial

[14] The Court did not hold that students have expectations of privacy identical to those of adults. It held only that students have

interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 469 U.S. at 339. In doing so, the Court recognized that maintaining security and order in schools requires "a certain degree of flexibility in school disciplinary procedures" and "some easing of the restrictions to which searches by public authorities are ordinarily subject." 469 U.S. at 340. The Court also recognized the "value of preserving the informality of the student-teacher relationship." 469 U.S. at 340. The student-teacher relationship, unlike the relationship between law enforcement officers and criminal suspects, is rarely adversarial. 469 U.S. at 349-350 (Powell, J., concurring).

Balancing the students' expectations of privacy against the teachers' and administrators' interest in maintaining discipline, the Court held that school searches do not require either a warrant or probable cause to be reasonable under the Fourth Amendment.[15] 469 U.S. at 340-341. Thus, the absence of a warrant or probable cause for suspecting that James Acton was taking drugs does not render the drug testing program at issue in this case unconstitutional.

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some legitimate expectations of privacy. A concurrence by Justice Powell, with whom Justice O'Connor joined, noted that: "In any realistic sense, students within the school environment have a lesser expectation of privacy than members of the population generally." 469 U.S. at 348.

[15] Exceptions to the warrant and probable cause requirement have also been found in other cases where " 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), *citing New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment). In *Griffin v. Wisconsin*, the Court held that a warrant and probable cause were not necessary in the search of a probationer's home. 483 U.S. at 876, 878. *See also, O'Connor v. Ortega*, 480 U.S. 709, 722, 725 (1987) (reaching a similar conclusion about the search of a public employee).

The Court in *T.L.O.* stated the test for "the legality of a search of a student" as follows:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," . . . second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." . . .

469 U.S. at 341 (citations omitted). This is the test which applies to the District's drug testing program.

The Court, however, left open the question of whether a school search can be "justified at its inception" without individualized suspicion. 469 U.S. at 342 n.8. The Court stated further that, "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Id.* Because the drug tests performed by the District are not based on individualized suspicion, this case squarely presents the question left open in *T.L.O.*

C. Individualized Suspicion Is Not an Essential Element of Reasonableness for Searches by School Authorities; Rather, It Should Be Treated as One of the Factors Considered in the Reasonableness Analysis.

1. *There are recognized exceptions to the requirement of individualized suspicion.*

This Court has recognized exceptions to the general requirement of individualized suspicion in cases similar to *T.L.O.* where a warrant and probable cause are not required. "Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to

the discretion of the official in the field.'" *New Jersey v. T.L.O.*, 469 U.S. at 342 n.8 *quoting Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979). As the discussion below shows, the drug tests performed by the District do not offend the Fourth Amendment, because, as in all other cases where suspicionless searches have been upheld, the privacy intrusion is minimal and the testing program adequately restricts the District's discretion.

This Court upheld warrantless, suspicionless searches in the form of border checkpoint stops in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). At border checkpoints, all vehicles were slowed to a virtual halt as officers searched them visually. 428 U.S. at 546. The Court found that the checkpoint stops were reasonable under the Fourth Amendment by balancing the following factors: 1) the substantial government interest in secure borders; 2) the impracticality of a reasonable suspicion requirement; 3) the minimal intrusion on privacy interests; and 4) the minimal discretion on the part of the officers.[16] 428 U.S. at 559-562.

This Court also upheld searches in the absence of a warrant and individualized suspicion in several cases in which the searches were administrative in nature.[17] These cases involve searches of commercial premises of businesses operating in closely regulated industries.[18] Close

[16] Earlier, in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), this Court rejected searches conducted by *roving* border patrols in the absence of a warrant or probable cause.

[17] Before 1967, the Fourth Amendment was not applied to administrative searches. *See, e.g., Frank v. Maryland*, 359 U.S. 360 (1959). But in that year, this Court held in *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967), and *See v. Seattle*, 387 U.S. 541, 543 (1967), that the Fourth Amendment applies to searches of businesses or homes made outside the criminal context.

[18] Originally, the administrative exception applied only to industries with a *history* of heavy government regulation. Later the category was expanded to include industries that are simply heavily regulated. *Donovan v. Dewey*, 452 U.S. 594, 606 (1981).

government regulation diminishes the business owner's expectation of privacy to a minimal level. *New York v. Burger*, 482 U.S. 691, 700-701 (1987). The Court has applied a test in the administrative search cases similar to that in *Martinez-Fuerte*. In addition to taking place in an industry with a diminished expectation of privacy due to heavy regulation, the inspection must be made under a regulatory scheme informed by a substantial government interest, the inspection must be necessary to further that scheme, and finally, the inspection program must be certain and regular enough to provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. at 702 (warrantless, suspicionless search of junkyard for stolen autos and auto parts upheld). *See also, United States v. Biswell*, 406 U.S. 311, 317 (1972) (warrantless, suspicionless search of federally licensed firearms dealer upheld); *Donovan v. Dewey*, 452 U.S. 594, 605 (1981) (warrantless, suspicionless search of hard rock mine conducted pursuant to Federal Mine Safety and Health Act upheld).[19]

Warrantless, suspicionless searches have also been upheld in public employment cases. *See, Skinner v. Railway Labor Exec. Assn.*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).[20] In these cases, suspicionless drug tests by urin-

[19] In contrast, where control on the discretion of government health and safety inspectors was inadequate and searches were of any business in interstate commerce, this Court has held warrantless searches unconstitutional. *Marshall v. Barlow's Inc.*, 436 U.S. 307, 314, 323 (1978).

[20] Prior to *Skinner* and *Von Raab*, the Court held in *O'Connor v. Ortega*, 480 U.S. 709, 722, 725 (1987), that employer searches of public employees for legitimate work-related, non-investigatory reasons as well as to investigate work-related misconduct are in the category of "special needs" cases in which no warrant or probable cause is required. As in *T.L.O.*, the Court noted in *O'Connor* that it was not deciding whether the reasonableness test it adopted applied in the absence of individualized suspicion. 480 U.S. at 726. The Court subsequently answered that question affirmatively in *Skinner* and *Von Raab*.

alysis of public employees were upheld as reasonable because of the governmental interest in railroad safety, *Skinner*, 489 U.S. at 628-629, and in the safety and integrity of the Customs Service drug interdiction efforts, *Von Raab*, 489 U.S. at 670, the minimal intrusion on privacy, *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 661-672, the lack of government discretion in administering the tests, *Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 667, and the close and substantial relation of the testing programs to the goal of deterring drug use, *Skinner*, 489 U.S. at 632; *Von Raab*, 489 U.S. at 675-676.

In *Michigan State Police v. Sitz*, 496 U.S. 444 (1990), this Court upheld the constitutionality of suspicionless searches at highway sobriety checkpoints. The Court balanced the state's interest in preventing drunk driving, the extent to which the sobriety checkpoints could reasonably be said to advance that interest, and the degree of intrusion on the motorists. 496 U.S. at 455. In addition, the Court considered the fact that the checkpoint guidelines minimized the discretion of the officers in the field. 496 U.S. at 453.[21]

Schaill by Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988), *rehg. denied* (1989) is the only case other than this one in which a federal appellate court has evaluated the reasonableness of suspicoinless drug testing by urinalysis limited to high school athletes. Applying the four factors from the suspicionless search cases discussed above, the court found that a high school athlete's privacy in the act of urination is significantly diminished, that the school's interest in preventing

[21] In *Delaware v. Prouse*, 440 U.S. 648, 661 (1979), the Court held that *roving* stops to check drivers for license and registration conducted with neither "an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches. . . .'" 440 U.S. at 661 *quoting Terry v. Ohio*, 392 U.S. 1, 22 (1968).

drug abuse by athletes was substantial, that drug testing by urinalysis is an effective deterrent and that the policy adequately controlled government discretion. 864 F.2d at 1318-1322.[22]

2. *Individualized suspicion is not essential to the reasonableness of a search in the school setting.*

In *T.L.O.*, the Court noted that suspicionless searches usually are upheld only where the privacy interests at stake are minimal and government discretion is adequately restricted. 469 U.S. at 342 n.8. This Court has indeed considered these two factors time and again, along with the importance of the government's purpose and the effectiveness of the search in carrying out that purpose, in upholding the reasonableness of suspicionless searches.

No reasonable distinction can be drawn between the school setting and the other contexts in which suspicionless searches have been upheld that would justify prevent-

[22] Lower courts have also upheld random, suspicionless testing of athletes in other contexts. For example, in *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991), the Seventh Circuit upheld testing of horse racing jockeys and other personnel. In finding such testing reasonable. Judge Posner stated that the "*incremental* loss of privacy" caused by such testing was "slight" given that those tested were already subject to complete medical examinations requiring urine samples. 943 F.2d at 683. *See also, Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3rd Cir. 1986) (daily, random selection of jockeys for urinalysis did not violate Fourth Amendment where those tested were subject to "pervasive regulation" thus reducing their expectation of privacy and where state had "strong" interest in conducting the unannounced search); *O'Halloran v. University of Washington*, 679 F.Supp. 997 (W.D. Wash.), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988) (applying two-part test of *T.L.O.* in upholding National Collegiate Athletic Association's random urinalysis testing of participants in NCAA-sponsored events); *Hill v. National Collegiate Athletic Association*, 865 P.2d 633 (Cal. 1994) (random urinalysis testing of college athletes did not violate state constitutional right to privacy); *But see, Moulé v. Paradise Valley Unified School District No. 69*, 863 F.Supp. 1098 (D. Ariz. 1994) (decided on the basis of the court of appeals' decision in the instant case); *University of Colorado v. Derdeyn*, 863 P.2d 929 (Colo. 1993).

ing schools from conducting suspicionless searches assuming these four factors are met. In fact, as discussed above, the school setting is truly unique. This Court has consistently deferred to the judgment of school administrators about the best methods for handling disciplinary problems. More importantly, this Court has repeatedly recognized the fundamental role of schools in protecting young people and creating responsible citizens.

Schools need the flexibility to apply every reasonable approach to solve the complex problems they face. To hold that individualized suspicion is an essential element of a school search, and not simply a factor to be weighed in the balancing test, would give students greater rights than adult public employees or business owners in regulated industries, a result which *T.L.O.* and the other cases in the school setting do not support.

D. The District's Drug Test Policy Satisfies the *New Jersey v. T.L.O.* "Reasonableness" Test Because It Was Justified at Its Inception.

The first prong of the *T.L.O.* reasonableness test—that the search was "justified at its inception"—is met in this case because there is a minimal intrusion on student privacy and the Policy restricts the District's discretion. When those factors are considered along with the District's significant interest, the difficulty of detecting drug use and the alternatives tried by the District, it is clear that the Policy in this case was "justified at its inception."

1. *The drug problem in the District's schools was severe and the District had an obligation to solve it.*

As is described in detail in the Statement of the Case, District officials were faced with a crisis in the classroom and in the sports program which they reasonably concluded was caused by significant drug abuse. (J.A. 24-25, 40-41, 53-54, 59-60, 84). The ability of the Vernonia teachers to educate their students was seriously impaired. Students demonstrated exceptional hostility and

defiance, creating an unprecedented "power struggle" between students and faculty. (J.A. 40, 48). The district court's finding that the District was at "its wits end" was not an exaggeration. 796 F.Supp. at 1357 (Pet. App. B at 86a).[23] One experienced teacher was almost driven to retirement by the situation. (J.A. 50). The administration and teachers foresaw the need for mass expulsions.[24] (J.A. 26-27; R. 32).

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[23] At every stage of this case, the Actons have vigorously contested the facts, especially whether the District elicited sufficient "proof" of a drug problem in the schools generally and among student athletes specifically. This Court should note, however, that the district court specifically found that the glamorization and use of drugs and alcohol became more "blatant," that drug use invaded the sports program and that the leading student athletes were also the leaders of the drug activity, thus endangering "the very center of activity of the school and the community." 796 F.Supp. at 1357 (Pet. App. B at 81a, 83a-84a). It further found that the evidence at trial "amply demonstrate[d] that the administration was at its wits end and that a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion." *Id.*, (Pet. App. B at 85a-86a). The district court found that this rebellion "was being fueled by alcohol and drug abuse as well as the students' misperceptions about the drug culture." *Id.*, (Pet. App. B at 86a). The circuit court could find no clear error in the district court's findings. 23 F.3d at 1519 (Pet. App. A at 18a-21a). This Court generally gives "great weight" to such concurrent findings of fact. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n.15 (1984).

[24] The District introduced into evidence a United States Department of Education publication entitled, *What Works, SCHOOLS WITHOUT DRUGS*, United States Department of Education, Lauro F. Cavazo, Secretary (1989), which noted:

> Drugs not only transform schools into marketplaces for dope deals, they also lead to the destruction of property and to classroom disorder. Among high school seniors, heavy drug users were more than three times as likely to vandalize school property and twice as likely to have been involved in a fight at school or at work as nonusers. Students on drugs create a climate of apathy, disruption, and disrespect for others. . . . A drug-ridden environment is a strong deterrent to learning not only for drug users but for other students as well.

(Def. Ex. 105 at 11).

It was reasonable for the District faculty and administration, who observed that athletes were role models for the school community generally and also were among those who defiantly glorified drug use, to be concerned about the safety of those athletes on the playing field. (J.A. 20-22, 24-25, 40-41, 45-48, 61-62). Although no Vernonia student was subpoenaed by the District and asked to admit under oath to using drugs during athletic events, Vernonia coaches had good reason to believe that their athletes were doing so. (J.A. 39, 54-56).

The wrestling and football coach testified to a strong suspicion that a state-class wrestler was under the influence of drugs when he was seriously injured during a match. (J.A. 54-56). That coach also observed highly unusual behavior on the football field, in which players ignored or apparently forgot well-drilled safety maneuvers and failed to react in a normal manner. (J.A. 56). The coach was concerned that drug use would slow reaction time, making athletes more susceptible to injury. (J.A. 56, 62). In addition, athletes were arrested for using drugs at a party which took place during school hours. (J.A. 49-50, 63-64). Teachers, administrators and coaches all testified that they were gravely concerned about the well-being of their students in the classroom and the safety of their student athletes in practice and competition. (J.A. 21-22, 24-25, 61-62).

The testimony of the District's expert, Robert L. DuPont, M.D., confirmed the validity of these fears. Athletes under the influence of drugs face a "substantially greater risk" of injury to themselves and others than those who are not drug impaired. (J.A. 68-70). Studies show that drug use begins between the ages of 12 and 20 and that "the most intense period for drug use initiation" is between the 7th and 9th grades. (Def. Ex. 106 at 30-31). The largest number of sports injuries occurs at the middle and high school levels. (J.A. 71). Drugs lead people to take risks, to be careless and impulsive and to disregard instructions. (J.A. 70). Drug impairment results in distraction, difficulty judging time and distance properly, memory impairment and a dulling of the sensation of pain. (J.A. 73). "A lot of energy is devoted to training athletes how to avoid injury to themselves and other people . . . on the playing field" and "[d]rug use takes away the protections that exist, not only for the individual himself, but for the other people with whom he shares that practice field." (J.A. 71).[25]

Justice Blackmun noted in his concurrence in *T.L.O.*: "Government has a heightened obligation to safeguard students whom it compels to attend schools." 469 U.S. at 353. Based upon the record in this case, it is fair to say that in seeking to satisfy that heightened obligation it would have been unreasonable for the District *to have refrained from* instituting the drug testing program. The administration, teachers and coaches, entrusted with the responsibility to solve this problem and using their best, well-informed judgment, concluded that drug testing was the only reasonable response to a crisis in their schools. This is exactly the type of decision where courts should defer to the judgment of the educators involved.

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[25] Adolescents are particularly vulnerable to the effects of drugs. Drugs threaten normal development in a number of ways:

- Drugs can interfere with memory, sensation, and perception. They distort experiences and cause a loss of self-control that can lead users to harm themselves and others.
- Drugs interfere with the brain's ability to take in, sort, and synthesize information. As a result, sensory information runs together, providing new sensations while blocking normal ability to understand the information received.
- Drugs can have an insidious effect on perception; for example, cocaine and amphetamines often give users a false sense of functioning at thier best while on the drug.

What Works, SCHOOLS WITHOUT DRUGS, United States Department of Education, Lauro F. Cavazo, Secretary (1989) (Def. Ex. 105 at 9).

2. *The District should not be subject to a "compelling governmental interest" standard.*

Both the district court and court of appeals applied *Skinner* and *Von Raab* to this case and held that those cases *require* a "compelling interest" as a prerequisite to upholding a search in the absence of individualized suspicion. 23 F.3d at 1826 (Pet. App. A at 58a); 796 F.Supp. at 1360-1361 (Pet. App. B at 102a-103a). Any standard set in *Skinner* and *Von Raab* does not control this case because those cases were not decided in the school context. The unique nature of the school setting calls for "easing" of Fourth Amendment requirements, "flexibility" and "common sense" in applying those requirements, and reasonable deference to the judgment of school administrators. *T.L.O.*, 469 U.S. at 340, 342-343. The governmental purpose in the school setting, therefore, need not be as strong as in other settings.

Moreover, *Skinner* and *Von Raab* do not establish a "compelling" governmental interest standard for suspicionless searches. Although this Court found the interests of the employers in *Skinner* and *Von Raab* to be "compelling," it did not state that a "compelling" interest was required to justify a suspicionless search. 489 U.S. at 633; 489 U.S. at 679. There are several references to lesser interests throughout those opinions. The Court referred to the requisite interest as "important," [26] "substantial," [27] and "valid." [28]

Skinner and *Von Raab*, like the other suspicionless search cases, require a balancing process. The central question is whether the governmental interest outweighs the privacy interest. The required level of governmental interest naturally varies with the extent of the privacy instrusion. Requiring a specific level of governmental

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[26] *Skinner*, 489 U.S. at 624.

[27] *Von Raab*, 489 U.S. at 666, 675.

[28] *Von Raab*, 489 U.S. at 671.

interest would be inconsistent with this Court's emphasis on balancing the governmental interest against the invasion of privacy in determining what is reasonable under the Fourth Amendment. *T.L.O.*, 469 U.S. at 337.

3. *The District had a compelling interest in solving the drug problem in its schools.*

Even if this Court were to hold that *Skinner* and *Von Raab* govern in the school setting, and that those cases require a "compelling" governmental interest as a prerequisite to a suspicionless school search, the District meets that standard here. The state has a "compelling interest" in educating and training its young people. *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). "Education 'is perhaps the most important function' of government, *Brown v. Board of Education*, 347 U.S. 483, 493, and the government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).

In contrast to *Von Raab*, where there was no evidence of actual drug use, 489 U.S. at 660, there is substantial and convincing evidence in this record of a drug problem which threatened safety and discipline. The question will undoubtedly arise whether the problems of a small rural school district can begin to rival the evidence in *Skinner* of drug abuse on a national level by railroad personnel or the risk in *Von Raab* that our nation's borders may be open to illegal drug trafficking. The answer is that drug abuse such as that the District sought to address is every bit as significant as the problems in *Skinner* and *Von Raab*.

In *Von Raab*, this Court was influenced by the fact that: "The Customs Service is our nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." 489 U.S. at 668. Certainly the next line of defense must be preventing drug use by children, when they are most vulnerable to the

physical and psychological effects of drugs. Indeed, it is difficult to make a qualitative distinction in terms of drug abuse prevention between the importance of keeping drugs out of this country and the importance of deterring our children from abusing drugs at a time when they are most vulnerable to addiction. (R. 43; Def.Ex. 106 at 30-32, 42).

The court of appeals interpreted "compelling" governmental interest as requiring the risk of "some additional horrible event, some terrible threat to society that can flow from the presence of drugs—some shooting, some explosion, some crash of train, truck or aircraft, or some breach of top secret national security." 23 F.3d at 1526 (Pet. App. A at 58a). This is far too narrow an interpretation. It incorrectly assumes that dramatic events which result in immediate physical injury are more serious than less tangible, but arguably far more significant, long-term injuries, such as those which result when schools fail in their educational mission. In fact, the drug problem in the Vernonia schools and drug use by chiidren generally is a "horrible event" which does pose a "terrible threat to society." It has immediate effects on the students, teachers, parents and community involved. More importantly, to the extent it inevitably interferes with the teachers' ability to instill knowledge and the values essential to citizenship, it will have even more profound, long-term consequences on society. A myopic view of what is sufficiently "compelling" to justify drug testing which focuses on near-term, physical injuries ignores these crucial facts.

Our public school officials are also responsible for the safety of their students. By requiring the threat of some serious physical injury caused by a catastrophic event, the circuit court's holding could either prevent schools from demonstrating a "compelling interest" altogether, or, at least, prevent schools from dealing with serious threats to safety until a traumatic injury or death occurs. By then, of course, it is too late, and the school district is

potentially subject to liability for failure to take reasonable steps to prevent a known risk of harm. School officials should be allowed to take reasonable and necessary steps to prevent serious injuries before they occur.

The court of appeals' narrow definition of "compelling" would make random drug testing—widely acknowledged to be an important tool in detecting and deterring drug use—available only to a select few. In *Skinner*, this Court relied on evidence that drug testing is sometimes the only effective means of detecting and deterring drug use. 489 U.S. at 628 (J.A. 67). In many cases only those with the ability to drug test will be able to deal effectively with drug abuse. A holding that would make what is in some cases the only tool to deal with drug abuse available to prevent shootings and train wrecks but not available to solve a serious drug problem in a school would be wholly unreasonable. It would also be very difficult to square such a holding with this Court's long-standing commitment to making it possible for teachers and administrators to maintain safety, discipline and order in the classroom.

4. *The Policy was justified at its inception because the District tried every reasonable alternative.*

The District tried many other less-intrusive means of dealing with the drug problem before implementing the Policy. These included conducting special classes and seminars on drug abuse, hiring well-known speakers to discuss the danger of drug abuse and presenting theatrical productions on the subject. (J.A. 25-26, 49, 63; R. 61). These efforts appeared to have no significant impact on the disruptive atmosphere. (J.A. 25-26, 34-35, 49-50, 65-66). The efforts taken by the District show that the drug testing program was undertaken with great deliberation. (J.A. 27).

The Actons have argued that the District could have tried yet other, additional measures to meet the drug and

disciplinary problem before implementing the testing program. The respondents in *Skinner* made a similar argument, and this Court responded that the reasonableness of the government's choice "does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." 489 U.S. at 629 n.9. The Court declined to second guess the conclusions made by the government after years of study. 489 U.S. at 629. *See also, Michigan State Police v. Sitz*, 496 U.S. at 454, (choice among reasonable alternatives left to government officials, "who have a unique understanding of, and a responsibility for, limited public resources . . . .")

5. The Policy was justified at its inception because it is very difficult to develop reasonable suspicion of drug intoxication absent testing.

Student drug impairment is difficult to reliably detect by observation or other means less intrusive than drug testing. As this Court recognized in *Skinner*, "[a]n impaired employee, . . . will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'" 489 U.S. at 628, *citing* 50 Fed. Reg. 31526 (1985). In this case Dr. DuPont testified that even if school officials were specially trained, they would miss "more than 90 percent of the impairment caused by drugs and alcohol." (J.A. 67). The extent to which drug or alcohol intoxication is outwardly visible depends to a great extent on how much experience the person has with the particular drug. People who have relatively little experience with the drug may look quite impaired from a single dose, but their tolerance to the behavioral effects grows with more exposure to the drug and it becomes very difficult to tell whether the person has used the drug. (Def. Ex. 106 at 34-36, 77). Adolescents are known "for giving a lot of behavior, including

mood swings and unpredictability" so it is especially difficult to detect drug impairment of adolescents. (J.A. 67).

A dangerous or illegal act which usually cannot be detected through observation will almost inevitably go undetected if individualized suspicion is required. This Court recognized this problem in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), upholding suspicionless stops of vehicles at permanent checkpoints for brief questioning of occupants. Reasonable suspicion would be "impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens." 428 U.S. at 557. The Court was particularly concerned that well-disguised smugglers would not be deterred if individualized suspicion were required. *Id.* Drug impairment of athletes presents an analogous problem. Teachers and coaches cannot reliably detect drug intoxication by observation. (J.A. 67). A requirement of individualized suspicion in this context would largely eliminate any hope of reliably identifying drug use by student athletes.

6. The Policy adequately restricts government discretion.

In *New Jersey v. T.L.O.*, the Court noted that, "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where *'other safeguards' are available to 'assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'*" 469 U.S. at 342 n.8 (citation omitted) (emphasis added). In this case the drug testing program leaves no discretion in school officials.[20] The court of appeals so found. 23 F.3d at 1522. (Pet. App. A at 37a).

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[20] Testing is initially required of all athletes and then is conducted on a lottery basis throughout the season. Athletes are selected weekly for testing. Those students are chosen randomly

This Court considered the lack of any discretion vested in officials responsible for conducting a search a significant factor in upholding the warrantless, suspicionless searches in *New York v. Burger*, 482 U.S. at 711; *United States v. Biswell*, 406 U.S. at 316; *Donovan v. Dewey*, 452 U.S. at 603-604; *United States v. Martinez-Fuerte*, 428 U.S. at 559; *Skinner*, 489 U.S. at 622; and *Von Raab*, 489 U.S. at 667.

For example in *New York v. Burger*, the Court relied in particular on the following aspects of the search at issue, which are analogous to the District's testing program:

> The statute informs the [person to be searched] that inspections will be made on a regular basis. . . . Thus, the [person to be searched] knows that the inspections to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute. . . . [The statute] also sets forth the scope of the inspection and, accordingly, places the [person to be searched] on notice as to how to comply with the statute. In addition, it notifies the [person to be searched] as to who is authorized to conduct an inspection.
>
> Finally, the "time, place, and scope" of the inspection is limited . . . to place appropriate restraints upon the discretion of the inspecting officers.

482 U.S. at 711 (citations omitted). As in *Burger*, the Policy in this case protects students from harassment or intimidation. The Policy's selection criteria assure students that school officials are acting within the narrow limits of their authority and without discretion.

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by a student drawing a number of names equivalent to 10% of the athletes playing sports that season while two adult witnesses observe. (J.A. 8, 30-31; Pl. Ex. 5 at 20).

The court of appeals, while acknowledging that the Policy restricts government discretion, appeared to give little weight to this factor in its analysis. 23 F.3d at 1522 (Pet. App. A at 37a). This Court should, as it has done in other cases upholding suspicionless searches, give significant weight to the Policy's control on government discretion. In this case, as in other cases upholding suspicionless searches, the prohibition of government discretion is severe.

7. *The Policy involved a minimal intrusion on the students' privacy.*

An individual's expectation of privacy varies according to several factors, including the context in which a search takes place, e.g., whether the individual is at home, at work, at school, in a car or in jail. Expectations of privacy are inherently diminished by a past history of significant governmental regulation, and the individual's voluntary participation in the activity which gives rise to the search. The intrusion on the students' privacy caused by the Policy was minimal.

a. *The school setting results in diminished expectations of privacy.*

James Acton's expectations of privacy are diminished because he was a student in a middle school. While students certainly have constitutional rights, those rights are often reduced in the school setting. As Justice Powell noted in his concurrence in *T.L.O.*, "[i]t is simply unrealistic to think that students have the same subjective expectation of privacy as the population generally." 469 U.S. at 348.

The process of educating young people is inherently invasive because of the unique relationship of students and teachers. Teachers do far more than instill factual knowledge. They are also responsible for discipline, safety, and the inculcation of values which are essential to citizenship, including respect for authority and the law. They

act as friend, authority figure, mentor, protector, moral leader, detective, prosecutor, judge and sometimes even jailer. "Of necessity, teachers have a degree of familiarity with, and authority over, their students that is unparalleled except perhaps in the relationship between parent and child." 469 U.S. at 348 (*Powell, J.*, concurring).

A teacher simply cannot do his or her job without constantly and pervasively intruding into privacy interests into which an employer, for instance, would never consider intruding. "[T]he preservation of order and a proper educational environment requires close supervision of schoolchildren as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *T.L.O.*, 469 U.S. at 339. While many middle school students would enjoy adult-level privacy from intrusions by their teachers, no student realistically expects such privacy and no teacher could adequately educate students if such privacy were given.[30]

b. *The nature of interscholastic athletics further reduces a student's expectation of privacy.*

Students who participate in sports both reasonably and subjectively expect less privacy than students generally. Participation in interscholastic sports is a privilege. That privilege carries with it a significant risk of physical injury to participants, heightened responsibilities for safeguarding participating students, and heightened risks of liability for teachers, administrators and school districts.

[30] This lack of privacy is balanced, of course, by the teacher's customary role as custodian of the students' welfare. In his *T.L.O.* concurrence, Justice Powell discussed "[t]he special relationship between teacher and student" which "distinguishes the setting within which schoolchildren operate." 469 U.S. at 349. As Justice Powell noted, "there is a commonality of interests between teachers and their pupils. The attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." 469 U.S. at 350.

Yet parents and the community rightfully expect school officials to protect all students, including those who participate in interscholastic athletics, from risk of injury.

Students who seek the benefit of participation in interscholastic sports reasonably understand that such participation also involves certain obligations. Student athletes reasonably expect to be subject to rules, regulations and examinations designed to minimize the risk of physical injury. Student athletes also reasonably expect that such rules, regulations and examinations may intrude to some extent on their personal privacy.[31]

Student athletes in the Vernonia schools must have a physical examination at the beginning of each season. (R. 61-62; Pl.Ex. 2 at 30). That examination includes urinalysis. (J.A. 8). James Acton underwent such an examination, during which he voluntarily provided a urine sample. *Id.* Although it is not in the record, the Court can take judicial notice that such medical examinations of student athletes are routinely required in public schools across the nation. This Court can also take judicial notice of the fact that such examinations routinely involve relatively significant privacy invasions including, in the case of males, probing the students' genitals. Such physical exams are routinely required without any individualized suspicion that a particular student is physically unfit to play sports. Just as with the customs workers in *Von Raab*, whose "successful performance of their duties depends uniquely on their judgment and dexterity," these

[31] In recent years, student athletes have also become aware of the role drug testing plays in the sports world. As the Court explained in *Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1319 (7th Cir. 1988):

> Perhaps even more demonstrative of the special characteristics of athletics is the high visibility and pervasiveness of drug testing in professional and collegiate athletics in this country and in the Olympic Games. The suspension and disqualification of prominent athletes on the basis of positive urinalysis results has been the subject of intense publicity all over the world.

students athletes "cannot reasonably expect to keep from [the District] personal information that bears directly on their fitness." 489 U.S. at 672.

Our society traditionally defers to local school officials and allows them to formulate rules to insure the safety of students. The Policy is such a rule. Its purpose, while more limited in scope, is substantially the same as that of a pre-season physical, i.e., to ensure the safety of the athlete. The testing is designed to detect whether student athletes are taking drugs and to deter from doing so. It is not a criminal search. It is not a punitive search. It is arguably not a disciplinary search because the consequences flowing from a positive drug test are so limited. Refusal to take a drug test does not result in criminal sanction or academic penalty. It results *only* in ineligibility for school-sponsored sports. (J.A. 9).

Drug testing is only one of many compromises of privacy made by students who decide to play sports. For example, athletic dress means locker rooms and locker rooms mean communal undress and lessened privacy expectations in the District schools. As in many schools, the Vernonia locker rooms are open spaces and the showers are communal. (J.A. 28, 48). At least one of the toilet stalls in the high school boys' locker room does not have a door. Thus, other students and teachers can observe student athletes completely unclothed using urinals and toilets. (R. 41, 125-127). In fact, during athletic events Vernonia athletes share an open stall with the public. (R. 125-129).

c. ***A student athlete's expectation of privacy is diminished even further because the Policy applies only to those who*** voluntarily ***engage in interscholastic athletics.***

James Acton's expectation of privacy is diminished beyond that of students in general because the drug test is required only of those who voluntarily engage in inter-

scholastic athletics. The voluntary nature of participation in sports diminishes the intrusion in two ways. First, students can avoid the intrusion by choosing not to participate in interscholastic sports. Second, by choosing to play such sports, students voluntarily give up significant personal privacy, and should reasonably expect to do so. Student athletes subject themselves to rules of conduct, grade-point requirements, dress and training rules, as well as to the rules of the Policy. (Pl. Ex. 2 at 30).

Like people who choose to conduct a business in a highly regulated field, students who volunteer to play sports know in advance they will be subject to drug testing. In *Skinner*, this Court noted:

> [T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.

489 U.S. at 627. Similarly, in *United States v. Biswell*, 406 U.S. 311 (1972), this Court stated that frequent unannounced inspections of a firearms dealer pursuant to federal law posed only limited threats to the dealer's limited expectations of privacy because the dealer chose to participate in a regulated business with knowledge that his records, firearms and ammunition would be subject to inspection. 406 U.S. at 316.

The Court also considered the public's ability to avoid the search in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). In upholding the constitutionality under the Fourth Amendment of fixed border checkpoints, the Court noted that "[m]otorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." 428 U.S. at 559. In other words, they can choose to avoid the checkpoints. Similarly, in *Wyman v. James*, 400 U.S. 309 (1971), the Court re-

jected a welfare recipient's argument that she did not have to submit to a home visit by the welfare department in order to keep her benefits. Even though such refusal would have resulted in loss of welfare benefits, this Court concluded: "[t]he choice is entirely hers, and nothing of constitutional magnitude is involved." 400 U.S. at 324.

More recently, in *Von Raab*, the Court cited with approval lower court decisions upholding the search of airline passengers and their luggage, and in particular the statement by Judge Friendly in *United States v. Edwards*, 498 F.2d 496, 500 (2nd Cir. 1974), that:

> "[T]he passenger has been given advance notice of his liability to such a search so that he can *avoid it by choosing not to travel by air.*"

(Emphasis supplied.) The Court in *Von Raab* also noted that "[i]t is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches." 489 U.S. at 671 (citations omitted).

Thus, this Court has found significantly diminished expectations of privacy in those who could avoid intrusions by giving up their livelihood, *United States v. Biswell*, their income, *Wyman v. James*, and their mode of travel, *United States v. Martinez-Fuerte*. At least the first two of those—livelihood and income—are clearly more important than school sports. The privacy interests of one such as James Acton, who could choose not to participate in interscholastic athletics, are equally diminished. This Court need not tie the hands of a school district faced with a situation like that presented here simply to avoid an intrusion which is exclusively incident to voluntary participation in sports.

d. ***The Policy itself minimizes the intrusion.***

The mechanics of the Policy itself minimize the privacy intrusion. Monitors are of the same gender as the student.

Students are not subject to direct scrutiny while producing the sample. (R. 31-32; 138-139). Female students are not observed at all while producing the sample. (J.A. 42). Male students stand at a urinal and are observed, if at all, only from behind and at a distance. (J.A. 31-32; R. 138-139). Monitors testified that they do not routinely observe males at all while they are giving the sample. *Id.* These conditions are similar to those males routinely encounter in a public restroom. At no time are the genitals of either male or female students exposed to the monitor while giving the sample. (J.A. 28, 42; R. 124).

Nor does the Policy create any subjective intrusion. Students have notice of the mechanics and consequences of the tests when they choose to play sports. There is no "subjective intrusion" such as that which this Court found offensive in cases involving random car stops. *See, e.g., United States v. Ortiz*, 422 U.S. 891, 894-895 (1975). Finally, the test results themselves are highly reliable, virtually eliminating the possibility of false accusation. (Stip. Test. of R. Velander at 5-7).

E. The District's Drug Test Policy Satisfies the *New Jersey v. T.L.O.* "Reasonableness" Test Because It Was Reasonably Related in Scope to the Circumstances Which Justified the Interference in the First Place.

The second prong of the reasonableness test in *New Jersey v. T.L.O.* requires that the search be reasonably related in scope to the circumstances which justified the interference in the first place. This requires a determination of whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342 (footnote omitted). In this case the Policy was reasonably related to the goal of deterring drug use and preventing athletic injuries and was not excessively intrusive.

1. *Drug testing by urinalysis is reasonably related to the District's objectives of deterring drug use and avoiding injury.*

The measures adopted by the District were reasonably related to the objectives of the search. A primary objective of the Policy was to deter athletes from using drugs and thereby protect them from physical injury. (J.A. 7, 27-28, 32). Deterrence is of particular importance when dealing with middle and high school students. Education and counseling alone usually will not cause a student who regularly uses drugs to stop, since such children are "in denial" and therefore need an "immediate" and "compelling" reason to stop. (Def. Ex. 106 at 60). This conclusion was borne out in the District when drug use continued after serious efforts at education and counseling. (J.A. 25-26, 34-35, 49-50, 65-66).

Drug testing "establishes an incentive for a person to not use" and has "a very powerful deterrent effect." (Def. Ex. 106 at 59-60). The risk of being identified as a drug user and being unable to participate in sports programs is "a very powerful deterrent to continued use" of drugs. (Def. Ex. 106 at 62).

Although the District only tested students who participated in interscholastic athletics, there was reason to conclude that deterring drug use by athletes would reduce drug use by the entire student body. Vernonia athletes were widely admired. (J.A. 20). Peer pressure is frequently the initial impetus for drug use by middle and high school students, especially when the peers are highly admired. (J.A. 68). Vernonia teachers and administrators were justifiably concerned that drug use by athletes would influence the other students.[32]

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[32] *See, e.g., Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1321 (7th Cir. 1988) *reh'g denied* (1989) ("Drug usage by this widely admired group [student athletes] is likely to affect the behavior of others and school officials are within their discretion in conducting a program specifically directed at athletes.")

This Court has repeatedly upheld suspicionless searches conducted for purposes of deterring prohibited conduct. In *Skinner* this Court stated that,

> By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

489 U.S. at 630 (citation omitted).[33] *See also, New York v. Burger*, 482 U.S. at 710 (frequent, unannounced inspections lacking warrant or suspicion were necessary in order to detect stolen cars and parts passing through automobile junkyards because, "surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all."); *United States v. Biswell*, 406 U.S. 311, 316 (unannounced, suspicionless searches of firearms dealers upheld because "[i]f inspection is to be a credible deterrent, unannounced, even frequent, inspections are essential."); and *Donovan v. Dewey*, 452 U.S. 594, 603 (unannounced, warrantless and suspicionless searches of a hard rock mine under the Federal Mine Safety and Health Act of 1977 upheld, again emphasizing the need for frequent, unannounced searches as a deterrent.) A random, suspicionless search can be justified, as it is in this case, by the need to deter prohibited conduct that is difficult to detect.

The legitimacy of the District's attempts to deter drug use is not in any way compromised by the relatively small

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[33] The deterrent effect in this case was arguably higher than in *Skinner*, where tests were only performed after an accident, an event most workers would not go to work expecting. 489 U.S. at 634 (Stevens, J., concurring).

number of students who tested positive for drug use.[34] As this Court noted in *Von Raab*, "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." 489 U.S. at 674. In fact, as this Court pointed out,

> [w]hen the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success.

489 U.S. at 675 n.3, *citing Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Moreover, in this case, unlike in *Von Raab*, there was significant evidence of a substantial drug problem in the District at the time the Policy was implemented. 489 U.S. at 660.

Furthermore, the Policy appeared to work. As the court of appeals found:

> The Policy contributed to reaching the desired goal. Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use, and the glorification of drug culture since the Policy was implemented.

23 F.3d at 1522 (Pet. App. A at 34a).

2. *The Policy is not excessively intrusive.*

T.L.O. requires a determination of whether a search is excessively intrusive in light of the age and sex of the student and the nature of the infraction. 469 U.S. at 342. The seriousness of the infraction which prompted the District to initiate the Policy cannot be overstated. The District reasonably believed that many Vernonia students were possessing and using drugs, both during

[34] The superintendent estimated that, in the three years following the adoption of the Policy, two of the students randomly selected for urinalysis tested positive for drug use. (J.A. 38, 83).

class and while participating in school-sponsored sports. Such activity was unsafe and destructive of the educational environment. The infraction which gave rise to the search in *T.L.O.*—smoking in the school—pales in comparison to the use of illegal drugs by students.

Considering the seriousness of the suspected activity, the search involved here was not excessively intrusive. As is discussed in greater detail above, Vernonia athletes had diminished expectations of privacy by virtue of: (1) their status as students in a public school; (2) their *voluntary* participation in extracurricular sports; and (3) the other, similar privacy intrusions inherent in middle and high school sports and routinely accepted by student athletes. Moreover, tests were designed to avoid direct observation of the act of urination or removal of clothes. (R. 39-40, 138). Finally, results were highly accurate, kept confidential and only used to direct student athletes into drug treatment or to limit participation in athletes. 796 F.Supp. 1354, 1364 (Pet. App. B at 121a-122a; J.A. 9; Stip. Test of R. Velander at 8).

The age of the students subject to testing also militates in favor of the Policy. Students of middle school age are particularly susceptible to drug abuse and addiction. (Def. Ex. 106 at 30-32, 42). Public school officials have a compelling interest in preventing drug abuse by and sports injuries to the children they are dedicated to protect.

CONCLUSION

The Policy satisfies both requirements of the *T.L.O.* reasonableness test. It also satisfies the requirements common to those cases in which this Court has upheld searches without individualized suspicion. Searches pursuant to the Policy are constitutionally reasonable. The District, therefore, respectfully requests that the judgment of the circuit court be reversed and the judgment of the district court in favor of the District be reinstated on the grounds that the District's Policy is not an unreasonable intrusion under the Fourth Amendment.

Respectfully submitted,

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STATEMENT OF THE CASE

James Acton is a student in the Vernonia School District ("the District") in northwest Oregon. He doesn't use illicit drugs, and the District has no reason to suspect he does. And yet it will not let James participate in school sports unless he consents to produce urine on demand to be tested for evidence of illicit drug use. The issue is whether this drug-testing requirement violates James's rights under the state and federal constitutions to be free from unreasonable searches.

A. Background

The District operates four schools, including Washington Grade School, in Vernonia, Oregon, a small, logging community in the Coast Range an hour west of Portland. (R. 18; Pl. Ex. 5 at 6). About 700 students attend these schools, and most of them participate in at least one of the seven interscholastic sports the District offers for grades seven and up: football, basketball, cross country, track, volleyball, wrestling, and golf. (Pl. Ex. 5 at 7; J.A. 20, 37). In the late 1980s, the school board concluded that it had a drug "problem" within the student body generally and the sports program particularly. The board's first reaction was to try to persuade students through lectures and assemblies that drugs can be harmful. (J.A. 25-26). But, impatient for immediate results, it soon switched from persuasion to coercion. First, it brought in a drug-sniffing dog -- but only for one day -- to search student lockers. (R. 25, 34-35). Then, in the fall of 1989, it adopted a mandatory drug-testing program for any student who wishes to participate in school sports. The purpose of the program is to protect the "health and safety" of athletes, according to the District's "policy statement," as well as the officials who designed the program and enforce it. (J.A. 7, 27-28, 61; Pl. Ex. 5 at 16).

B. The Drug "Problem"

It is important to carefully describe Vernonia's drug "problem," because the District persistently overstates it. For example, in its petition for a writ of *certiorari*, the District told this Court that an "epidemic" of drug use within the student body "invaded" the sports program, "endangering the very center of activity of the school and the community," and leaving the school board with no alternative to drug testing but "mass expulsion" of students. Pet. at 3, 7 and 10-11. The District tones down the rhetoric in its brief on the merits, but nevertheless tries to paint the same picture. *E.g.*, Pet. Br. at 28 (referring to a "crisis in the classroom and the sports program"). In fact, there is little evidence of Vernonia students using drugs, and no evidence of any athlete in Vernonia ever competing while on drugs, let alone causing or sustaining injury.

The evidence consists almost entirely of complaints by a few teachers and administrators about a perceived decline in student deportment in the mid- to late-1980s. Students generally seemed to be less well-mannered than anyone remembered. Some of them refused to pay attention in class, said rude, obscene, and disrespectful things, laughed aloud at serious moments, and generally acted like juveniles -- at least, it appeared to some teachers that more students were behaving this way than ever before. (J.A. 21-22, 39-40, 47-48, 60-61, 66-67). School officials were particularly disturbed by a group of students who called themselves "the Big Elks." It is unclear how many students were at the "core" of this group -- one teacher said four to six (R. 81), which is less then one percent of the student body; another said ten. (J.A. 60). In any event, the Big Elks went around campus "bugling" and "butting" their heads together in an adolescent attempt to demonstrate their "camaraderie." (J.A. 41). Another group -- likewise of uncertain size -- called itself the "Drug Cartel" and exhibited equally strange behavior. (J.A. 48). There is no evidence, however, that any "Elk" or "Cartellian" ever actually used drugs or that drugs were the reason why they behaved as they did. (J.A. 52).

The perceived decline in student behavior coincided with an increase in the number of students referred by teachers to administrators for discipline -- known locally as "disciplinary referrals." (R. 44, 69). For want of some other explanation for the downturn in student deportment, the teachers concluded that drug use was on the rise within the student body, contrary to national and statewide trends. (J.A. 77). This assumption was supported, at least in the teachers' minds, by unconfirmed, second-hand reports of off-campus drug use, almost all of it hearsay or hearsay within hearsay,[1] received over the Actons' continuing objections,[2] and by reports of students romanticizing drugs in

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[1] For example, Randy Aultman, a principal, testified: "Four football players talked to the football coach and admitted that they have used drugs, and amphetamines were those drugs, and the coach told me[.] [T]he kids never came forward and said, you know, they did . . . ." (J.A. 23). In other words, four students told the football coach that they had used amphetamines. The coach told Mr. Aultman what he had heard, and he repeated it at trial as if it were fact. Later, Mr. Aultman admitted that he had never actually seen or caught a student taking drugs and that he was acting on second-hand reports. (J.A. 36).

Ron Svenson, a coach and teacher, testified: "When I was an assistant coach the head football coach was called in and I believe it was in the football season of '85 and apprised of the fact that parents called and said that some of their sons -- that other kids on the team had done drugs on a road trip . . . ." (J.A. 53). In other words, the football coach told Mr. Svenson that some parents told the football coach that some students told the parents that some other students had taken drugs during a road trip.

[2] As the District notes, Pet. Br. at 4, n.3, the trial court granted the Actons a continuing objection, on hearsay grounds, to these second- and third-hand reports of students using drugs. (J.A. 22-23; R. 107, 109-10).

(continued...)

papers and hallway conversations.[3] But only one of the teachers who testified at trial reported that she ever actually observed any student taking drugs.[4]

The District's assumption that every unruly student is unruly because of drugs is, on its face, dubious and, on the record, unsubstantiated. As noted above, there is evidence that more students were misbehaving than before, but no evidence that any, let alone many or most, of those students were acting up because of drugs. Likewise, there is evidence that disciplinary referrals were up, but no evidence

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[2] (...continued)
The court said it would not receive this evidence for the purpose of proving that students actually were using drugs, because that would be hearsay, but would receive it for the limited purpose of explaining why school officials acted as they did. (J.A. 23; R. 116-17, 143-44). Accordingly, this evidence cannot support a finding that there was in fact a drug problem in the school district, merely that school officials *thought* there was. The District's brief repeatedly ignores this limitation on the use of its evidence. *E.g.*, Pet. Br. at 6.

[3] A teacher who taught composition to 90 or so students each year for 13 years testified that 8 or 9 of them -- which works out to less than one percent of all of her students -- had written papers that romanticized drugs. (J.A. 46, 48, 51). There is no evidence that any of those students, or others who were overheard in the hallway bragging about drug use, actually took drugs, or that this was anything but juvenile bravado.

[4] Marsha King testified that she looked out of a window of the high school and observed students at a cafe across the street passing cigarettes back and forth. (J.A. 39; R. 80). She concluded that the cigarettes were "joints," that is, contained marijuana, but did not explain how she could tell, from that distance, that they did not instead contain tobacco. Nor did she explain how many students she saw, when she saw them, or whether any of them were athletes. On another occasion, Ms. King saw a student who was obviously intoxicated, but on alcohol, not drugs. (J.A. 40; R. 81). This was as close as Ms. King or any other witness came to direct observation of any illicit drug use.

that any of those referrals involved drugs. Students who misbehaved in class were "referred" whether or not drugs were suspected as the reason for their misbehavior. (R. 83). Therefore, the District is not justified in contending, based on referral numbers alone, that the downturn in student deportment was completely, or even partly, drug-driven.[5]

The Actons do not contend that Vernonia has managed, through geographic isolation, to escape drug infiltration entirely, or that no students in Vernonia were using drugs before the District adopted its drug-testing program. Nor do they contend that even so much as one student on drugs would not be a "problem" and reason for concern. Their point is simply that it is misleading for the District to assert that drug use in Vernonia schools had reached "epidemic" proportions, or anything like it, and that "administrators and teachers foresaw the need for mass expulsions." Pet. Br. at 29.[6] On this record, the most that can be said is that "some" students appeared to be taking drugs, which is exactly what the court of appeals concluded when it reviewed the evidence. In a finding not challenged by the District, the court of appeals said: "[W]e reemphasize that what the evidence shows, *and all it shows*, is that there was *some* drug usage in the schools . . . ." 23 F.3d at 1519 (Pet. App. 20a)(emphasis added). This is as far as the court of appeals

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[5] From the early to late 1980s, disciplinary referrals went from 40 or 50 per year to double that. (J.A. 21). But, of course, one student could have multiple referrals, so the absolute number of referrals is not very helpful in determining the number of misbehaving students.

[6] *One* witness testified that "massive expulsion" or "some tremendous alternative," meaning, apparently, drug testing, were the only two solutions to the school's disciplinary problems. (J.A 26-27). But this is clearly hyperbole. There is no evidence that any student was expelled for using drugs or that the school board even considered expelling a student for that reason, let alone masses of them.

went in its findings, and as far as the record allowed it to go.[7]

C. Drugs In The Sports Program

If there is little evidence of drug use in the classroom, there is even less of it in the sports program. Indeed, the District conceded, in a pre-trial interrogatory, *that it is unable to confirm so much as one drug-related injury in the entire history of its sports program.* (J.A. 79-80). This includes, of course, the period of time when, the District now says, drug use was rampant in its schools.[8] As discussed

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[7] The District argues that the trial court's findings were endorsed by the court of appeals and thus are entitled to "great weight" in this Court. Pet. Br. at 29, n.23. It is true that this Court will defer to the lower courts when they concur in their findings, but that is *not* what happened here. The court of appeals did not simply adopt the trial court's findings as its own. To the contrary, it reviewed the record and made its own observations about the extent of the drug problem in Vernonia. *See* 23 F.3d at 1512 (Pet. App. 2a-4a). Moreover, although the court rejected the Actons' contention that there was no evidence of *actual* drug use, merely *perceived* drug use, *id.* at 1519 (Pet. App. 18a-19a), it immediately went on to "reemphasize" that all the record shows is "*some* drug usage in the schools." *Id.* (Pet. App. 20a-21a). The court appeared to studiously avoid words like "epidemic" and "crisis," which punctuate the briefs of the District and the *amici* supporting it. Indeed, the court noted that even the word "problem" may misdescribe the situation: "Perhaps dubbing [the District's drug experience] a 'problem' is a matter of perception or definition. What appears to be a problem in one place might seem to be a minor annoyance elsewhere." 23 F.3d at 1519 (Pet. App. 20a).

[8] The District suspects that one athlete may have been injured while competing on drugs, but the evidence in support of that suspicion is skimpy at best. The wrestling coach, Ron Svenson, testified that a high school student was injured in an "away" match when he failed to react as quickly as the coach would have liked to a hold his opponent put on him. (J.A. 54-55). *A day later* Mr. Svenson went to the hotel room the

(continued...)

above, the District concluded that drug use was commonplace in the classroom because of discipline problems there. There is no evidence, however, of similar problems on the playing field. It follows that, if students were taking drugs, they were not taking them before competing.

Perhaps the most telling evidence on the extent of drugs in the sports program before the drug test is the evidence that only two students, both in high school, have flunked the test. (Pl. Ex. 5 at 13-15, 25; J.A. 38; R. 64). There are several possible explanations for this near-perfect record. One is that, as the District now contends, many athletes were taking drugs before the drug test was enacted, but they all quit immediately and en masse as soon as testing started. This seems unlikely, however, if drugs were as embedded in the school culture, and are as addictive, as the District suggests. Another explanation is that, again, many athletes were taking drugs, but they all chose to give up sports and

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[8] (...continued)
wrestler was sharing with *three* other students. While there he smelled what he believed to be marijuana and concluded that "somebody in the room was smoking." *Id.* Of course, that "somebody" was not necessarily the injured wrestler, and even if it were, it does not follow that he had also smoked marijuana before competing the day before or, if he did, that marijuana played any role in his injury. Mr. Svenson was the first to admit that this evidence leads nowhere. "There was no way," he said, "of particularly proving at that point in time whether he was under the influence [during the match]." (J.A. 56).

Mr. Svenson, who also coached football, testified that he watched some football game films and noticed that some of the students did not react to situations the way he taught them. This led him to wonder if they were under the influence of drugs during the games. (J.A. 56). He never found out.

This was as far as the District got in trying to prove that any student ever competed in a District-sponsored athletic event while under the influence of illegal drugs.

avoid the test rather than give up drugs. There is no evidence, however, that participation in school sports dropped off when the testing began and, indeed, 110 students were tested in just the first three weeks of the program. (Pl. Ex. 3 at 1; Pl. Ex. 5 at 19). A more plausible explanation for so few failed tests is that, in fact, few athletes were taking drugs before testing started.

The District superintendent admitted that the District does not know what percentage of students who play sports take drugs illegally and that no effort has been made to find out except through the drug test. (Pl. Ex. 5 at 15). Since the test has detected next to no one, the District is hard pressed now to argue that drugs "invaded" the sports program; to the contrary, they appeared to have largely stayed out of it.

D. The Drug-Testing Program

In response to its concern, justified or not, about drug use in school sports, the school board decided to institute a mandatory drug-testing program for all student athletes. In its present form,[9] the program prohibits students from participating in school sports unless they consent to have their urine tested for traces of certain illicit drugs: cocaine, marijuana, amphetamines and, occasionally, LSD. (J.A. 8; Pl. Ex. 4 at 4-5; Pl. Ex. 5 at 18). Notably absent from this list is perhaps the most commonly abused drug, at all age levels, namely, alcohol. Pet. Br. at 9. Also excluded are steroids and other substances designed to enhance athletic performance. (J.A. 86).

Athletes are tested at the start of each athletic season in which they participate. (Pl. Ex. 5 at 221-22). They are also subject to random tests, conducted weekly during the season. *Id.* The testing protocol depends on gender. Boys are taken to the locker room where, one at a time, they urinate into a vial while a male faculty member, either Mr. Aultman, the grade school principal, or Mr. Svenson, a teacher and coach in the high school, waits close behind. (Pl. Ex. 4 at 3). Mr. Aultman testified that sometimes he watches the student produce the urine sample, but often he just listens. (J.A. 31-32). Mr. Svenson denied watching or listening, but both he and Mr. Aultman admitted that that is why they are there: to observe the students so they don't cheat. (J.A. 32; R. 138-39). The students, of course, don't know whether or when the monitor is watching them. The procedure for girls is sightly different. They produce their samples, one at a time, in an enclosed stall while a female teacher stands outside listening through a vent in the door for the normal sounds of urination. (J.A. 42; R. 78-79; Ex. 4 at 4; Ex. 5 at 21-22).

Any student who refuses to be tested is automatically

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[9] The original program was in force from September 1989 to August 1990 (J.A. 7), and applied to any student who participates in any extracurricular activity, athletic or nonathletic, including, for example, band, drama, and student government. (Pl. Ex 5 at 16-17; J.A. 29-30). The District claims that it amended the program to apply only to athletes in order "to assure its legality." Pet. Br. 9. In fact, it may have been motivated by funding concerns. As the Solicitor General explains in his brief, the District has received $7,500 per year under a 1986 congressional act that authorized federal grants to local schools for, among other things, "non-discriminatory random drug testing programs for students voluntarily participating in *athletic* activities." Br. of United States at 1-2 and n.1, quoting 20 U.S.C. §3192(d)(emphasis added). If the District had stuck with its original program, it would not have been "legal" to (continued...)

[9] (...continued)
receive these funds.

In October, 1994, Congress reauthorized the 1986 act, minus the provision for federal funding of drug tests. Br. of United States at 2, n.1.

suspended from the sports program for the remainder of the athletic season. (J.A. 8). A student who flunks the test -- that is, a student whose urine sample tests "positive" for the target drugs -- is subject to specified and escalating penalties. For a first "offense," the student is given a choice between "[p]articipating in an assistance program and taking weekly drug tests for six weeks" or "be[ing] suspended from participating in athletics for the remainder of the current season and the next season for which he/she is eligible." (J. A. 9). For a second "offense," the first option is removed; the student is suspended for the remainder of the current season and all of the next season. *Id.* A third "offense" results in suspension through the next two seasons. *Id.*

In addition to submitting their urine for inspection, students who have been taking prescription drugs "must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." (J.A. 8).[10] This information is then shared with the lab that tests the urine to aid in interpreting the test results. (Stip. Test. of R. Velander at 3).

The District superintendent, principals, vice principals, and athletic directors have direct access to the test results. (J.A. 29). Also, other officials who are involved in the ensuing due process hearing, counseling programs, and weekly repeat drug tests will necessarily find out when a student tests positive.

E. Effect Of Drug Testing

The District asserts that the drug-testing policy accomplished its goal of discouraging athletes from competing while on drugs. But since there is no evidence that any students were doing that, and since there were as many drug-related injuries before the policy took effect as after -- to wit, none -- it is impossible to conclude that the policy accomplished anything except to invade student privacy.

It is true that some teachers noted an improvement in classroom behavior after the policy was adopted, but that wasn't the goal of the policy -- at least not the stated goal. And since there is no basis for finding that all of the previously unruly students were unruly because of drugs, there is likewise no basis for concluding that the policy had anything to do with the turnaround in their behavior.

Even if classroom discipline was entirely drug-driven, and even if the improvement in discipline was due solely to a decline in drug use -- big ifs on this record -- it still cannot be asserted, without guesswork, that the decline in drug use was due to drug testing, rather than to the District's other, ongoing drug education and counseling programs, which the superintendent called "effective." (R. 63-64; Pl. Ex. 5 at 20). The drug-testing program is "only a small part" of the District's anti-drug campaign, according to the program's author. (Pl. Ex. 3 at 1). That being so, the District is not justified in now claiming that drug-testing was solely responsible for whatever improvement there may have been in the drug "problem."

The District's own expert, Dr. Robert DuPont, testified that drug use among high school students has declined steadily, both across the state and across the nation, since the mid-1980s, which includes the period of time when the District's drug-testing policy was in force. (J.A. 77). Whatever caused this trend -- Dr. DuPont attributes it to decreasing societal tolerance of drugs and widespread publicity over the death of Len Bias from an overdose of cocaine (*id.*) -- may also account for the trend in Vernonia, if in fact there was one there.

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[10] The form the District uses also requires the students to identify their nonprescription medications and the names of their treating physicians. (Def. Ex. 109 at 1, C).

As the District notes, one teacher thought that student grades improved post-testing, Pet. Br. at 12, but the District offered no evidence, such as summaries of transcripts or test results, to support that observation.

F. The Drug Test Applied To James

In the fall of 1991, James was 12 years old and a seventh grader in Washington Grade School. He was interested in sports and tried out for the football team. (J.A. 16; R. 6-7). On the first day of practice, the coach gave him a drug-testing consent form, which he took home and discussed with his parents. They -- James and his parents -- decided not to sign. (J.A. 16-17; R. 7-8). For that reason alone, the District kicked James off the team and declared him ineligible for school sports until he consents to drug testing. (R. 8-9, 12-13).

James's father, Wayne, testified that he believes the drug test is an invasion of James's privacy and a violation of his civil rights. (R. 9). He also expressed concern that drug-testing sends the wrong message to students: a message that, in the government's eyes, everyone is presumed guilty -- in James's case, guilty of using illicit drugs -- until proven innocent. (R. 9-10). There is no question, however, that James *is* innocent. As the court of appeals found, "[n]o evidence suggest[s] that James has ever used drugs or that the District has any reason to suspect that he has." 23 F.3d at 1517 (Pet. App. 9a).

G. The Proceedings Below

James's parents, on his behalf, brought this action to enjoin the District from enforcing its drug-testing program against him. In their complaint, they alleged that the program violates his rights under the Fourth Amendment and Article I, section 9, of the Oregon Constitution, both of which prohibit "unreasonable" government searches. (J.A. 3-6). Following a bench trial, the district court found no violation of either constitution and entered judgment for the District. *Acton v. Vernonia School Dist. 47J*, 796 F.Supp. 1354 (D.Or. 1992)(Pet. App. B). The Actons appealed, and the court of appeals unanimously reversed. *Acton v. Vernonia School Dist. 47J*, 23 F.3d 1514 (9th Cir. 1994) (Pet. App. A).

At the outset of its opinion the court of appeals announced that it was "constrained, in the first instance, to decide this case on Oregon constitutional grounds," 23 F.3d at 1518 (Pet. App. 16a), "in order to avoid addressing federal constitutional claims unnecessarily." *Id.* (Pet. App. 12a-13a). This was possible, the court said, because Article I, section 9, and the Fourth Amendment are not "coextensive" and, moreover, the state provision is more protective than the federal provision: "We can say with absolute confidence that the Oregon Constitution will not be construed to offer less protection than the Fourth Amendment. [And] [i]t is highly likely that it will be found to offer more protection." *Id.* (Pet. App. 16a).

A leading Oregon case on suspicionless searches is *State v. Tourtillott*, 618 P.2d 423 (Or. 1980), *cert. denied*, 451 U.S. 972 (1981), which approved a police roadblock set up on the opening day of deer season to check for unlicensed hunters. In reaching that decision, the Oregon Supreme Court relied primarily on this Court's opinion in *Delaware v. Prouse*, 440 U.S. 648 (1979). Accordingly, the court of appeals turned to *Prouse* for guidance in construing Article I, section 9. From *Prouse*, the court "distilled" four factors to consider in evaluating a suspicionless search: "(1) the importance of the governmental interests [served by the search]; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure -- that is[,] how well it contributes to the

reaching of its purported goals and how necessary it is." 23 F.3d at 1521 (Pet. App. 31a).

Taking these factors in reverse order, the court concluded, first, that the "efficiency" factor weighed in favor of the drug-testing program, but only "slightly." *Id.* at 1522 (Pet. App. 34a). It next concluded that the "discretion" factor also favored the District's position, because the drug test is "completely random." *Id.* (Pet. App. 36a). That left two factors -- "intrusiveness" and "importance" -- and those factors, the court said, "are dispositive." *Id.* (Pet. App. 37a).

Compelled urinalysis is a substantial intrusion on privacy, the court explained, for schoolchildren as well as adults. It noted that "[c]hildren *are* compelled to attend school, but nothing suggests that they lose their right to privacy in their excretory functions when they do so." *Id.* at 1525 (Pet. App. 52a)(emphasis in original). "Nor can we say," the court continued, "that the privacy interests of athletes are substantially lower than those of students in general." *Id.* at 1525 (Pet. App. 53a).

Turning, then, to the District's interest in drug testing, the court observed that those interests -- preventing unnecessary athletic injuries, reducing the attraction of drugs among other students, and improving discipline -- "are not minimal." *Id.* at 1526 (Pet. App. 56a). But, the court said, those interests

> suffer by comparison to the kinds of dangers that have existed when random drug testing has been approved. The extreme dangers in hazards involved in the prior cases are simply not present here. The prospect that an athlete might hurt himself or a competitor is real enough, but it is not a risk of the same magnitude as an airplane or train wreck, or a gas pipeline or nuclear power plant disaster . . . .

Id. at 1526 (Pet. App. 56a-57a).

Balancing all of the factors, the court concluded:

> [W]hen we mix all of the elements together -- the slight weight in favor of efficiency, the privacy interests, the governmental interest, and the discretionary factor -- and step back to look at the compound they yield, it becomes apparent that the policy violates the Fourth Amendment. It follows that it also violates Article I, Section 9[,] of the Oregon Constitution.

Id. at 1526 (Pet. App. 59a-60a).

The District petitioned this Court to consider whether its drug-testing program offends the Fourth Amendment, not whether it offends Article I, section 9, and, indeed, the District has not briefed the latter issue. For reasons set forth below, the Court should hold that the policy *does* violate the Fourth Amendment. If, however, the Court holds otherwise, that should not end the case. Instead, it should be remanded to the court of appeals to determine, once again, whether the program nevertheless violates the more-shielding state constitution. As the court of appeals put it, the Fourth Amendment merely establishes "the floor," not "the ceiling," for a lawful search in Oregon. 23 F.3d at 1521 (Pet. App. 33a).[11]

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[11] In their brief opposing the petition for a writ of *certiorari*, the Actons argued that the Court should deny the writ because the decision below rests on state law. The Actons will not repeat that argument here, but do not thereby concede that it is proper or advisable for the Court to hear this case. They urge the Court to dismiss the writ as improvidently granted.

SUMMARY OF ARGUMENT

The Fourth Amendment applies to searches conducted by school officials, *New Jersey v. T.L.O.*, 469 U.S. 325 (1969), and drug testing by urinalysis is a search. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

As a general rule, the government cannot search a person without reason to suspect that he or she is guilty of wrongdoing. There is an exception, however, in limited circumstances, where: (1) the search serves some "special need" beyond the normal need for law enforcement; (2) the government's interest in searching is compelling; and (3) the privacy interests affected by the test are minimal. *Skinner*, 489 U.S. at 624. Applying this balance-of-interests test, the Court upheld drug-testing programs for railroad employees who are involved in major train wrecks, *Skinner*, and customs agents who carry lethal weapons, engage in the direct interdiction of narcotics, or have access to sensitive government information, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). The Court concluded in *Skinner* and *Von Raab* that the employees covered by the tests are engaged in safety- or security-sensitive activities, and often "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. The government's "compelling" interest in preventing these "disastrous consequences" justified the substantial invasion of privacy that drug testing causes.

The District's drug-testing program fails the *Skinner* and *Von Raab* balancing test. First, drug testing by urinalysis is no less invasive and degrading for minors than it is for adults. Students do not surrender their expectations of privacy in their excretory functions when they attend school or go out for sports, and nothing in their experience in the classroom or on the playing field prepares them for the school's present demand to produce urine for inspection.

Second, the District's test procedures are much more intrusive than the procedures upheld in *Skinner* and *Von Raab*. The District requires students to produce the urine sample on demand, in school, and under observation by school officials. In *Skinner* and *Von Raab*, by comparison, the urine sample was collected by an independent monitor at an independent site and, at least in *Von Raab*, with five-days advance notice. Furthermore, the District requires students to disclose to school officials all of their prescription medications, thus enabling the officials to learn, even without testing, intimate details of the students' private lives.

Third, the goal of the District's drug-testing program -- preventing drug-related athletic injuries -- is much less compelling than the goals of the programs upheld in *Skinner* and *Von Raab*: preventing train wrecks, misuse of deadly weapons, compromise of the nation's borders, and disclosure of state secrets. Junior high school athletics is not "safety-" or "security-sensitive," as those terms are used in *Skinner* and *Von Raab*. The typical sports injury in Vernonia is a pulled muscle or torn ligament, and the District has never even had an injury that it can relate to drugs.

ARGUMENT

THE DISTRICT'S DRUG-TESTING PROGRAM VIOLATES THE FOURTH AMENDMENT

A. The Fourth Amendment Applies To School Searches

Public school students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506 (1969); *see also New Jersey v. T.L.O.*, 469 U.S. at 334; *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The Fourth Amendment, in particular, protects stu-

dents while in school. In *New Jersey v. T.L.O.*, the Court squarely held that school officials must comply with Fourth Amendment strictures when they search students on school grounds. 469 U.S. at 333-37.

Indeed, it is important for them to comply *scrupulously*. "Schools," it has been noted, "are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry." *Id.* at 373 (Stevens, J., concurring in part and dissenting in part). "The values [students] learn there, they take with them in life." *Id.* at 386. One of our most cherished values, of course, is the right to privacy, which Justice Brandeis memorably described as "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928)(Brandeis, J., dissenting). If a school is not careful to protect that right on behalf of its students, they will naturally come to view the Fourth Amendment and other constitutional prerogatives as mere platitudes, not to be taken seriously.

The District's observation that "public schools are entrusted with the difficult task of preparing students for citizenship," Pet. Br. at 18, is true, of course, but it hardly supports the District's assertion that school officials are somehow excused from the restraints the Constitution places on all other governmental agents. To the contrary, the Court has repeatedly emphasized that "[t]he authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." *Goss v. Lopez*, 419 U.S. 565, 574 (1975). *See also West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 637. As Justice Brennan once observed: "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe v. Renfrow*,

451 U.S. 1022, 1027-28 (1981)(dissenting from denial of *certiorari*).[12]

B. Drug Testing Is A "Search"

In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. at 617, the Court held that a drug test for adults was a "search" under the Fourth Amendment, "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." The same can be said of drug tests for minors. Thus, the District's drug-testing program is a search and must comply with the Fourth Amendment. The District agrees. Pet. Br. at 17, n.13.

C. Standards For Drug Tests

The first clause of the Fourth Amendment prohibits "unreasonable" searches. In deciding what is reasonable, the Court has turned first to the Amendment's second clause, which states that "no Warrants shall issue but upon probable cause." Accordingly, the Court has repeatedly held that, as a general rule, the government cannot search a person without probable cause to suspect the person has done something wrong. *E.g.*, *Dunaway v. New York*, 442 U.S. 200, 214 (1979); *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Even in cases involving brief, minimally intrusive searches, the Court has almost always insisted upon some individualized suspicion of wrongdoing. *E.g.*, *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

The history of the Fourth Amendment illustrates the importance of the individualized suspicion requirement. The

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[12] It should be noted that the oldest of the District's students are 18 years old, old enough to vote in elections, Or. Const. art. II, §2(1)(a), and to serve on juries, Or. Rev. Stat. §10.030(2)(c), two of the most important responsibilities of citizenship.

Amendment was drafted in reaction to the "general warrants" that allowed British officers to search at large through colonial homes and businesses for evidence of crime, anti-Crown literature, and illegally imported goods. *See generally Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978); *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977); *Stanford v. Texas*, 379 U.S. 476, 481-85 (1965); *Frank v. Maryland*, 359 U.S. 360, 363-65 (1959). "The vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary action by officers of the new union . . . ." *Frank*, 359 U.S. at 363. Consistent with its historic origins, this Court has held that "some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1975).

Because individualized suspicion lies at the very core of the Fourth Amendment, the Court has strictly limited the circumstances in which the government may search without it. For example, suspicionless searches are almost never allowed in criminal cases. *See Skinner*, 489 U.S. at 619 ("Except in certain well-defined circumstances, a search or seizure in [a criminal case] is not reasonable unless accomplished pursuant to a judicial warrant issued upon probable cause"). And, even where a search serves "special governmental needs, beyond the normal need for law enforcement," it is still necessary to "balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *National Treasury Employees Union v. Von Raab*, 489 U.S. at 665-66, citing *Skinner*, 489 U.S. at 619-20.

This is not a toothless test, and the mere invocation of "special needs" does not justify a suspicionless search. To the contrary, in *Skinner* and *Von Raab*, both of which involved random drug tests for government employees, the

Court carefully reviewed the government's interest in testing and the employees' interest in privacy before concluding that the challenged drug tests were constitutional as applied to some, but not all, of the targeted employees. Therefore, to resolve the Fourth Amendment issue presented in this case, it is useful to examine in detail the *Skinner* and *Von Raab* programs and the governmental interests they were designed to serve.

Skinner concerned Federal Railroad Administration regulations that authorized blood, breath, and urine tests of railroad employees who are involved in major train wrecks or who violate specified safety rules. The FRA acted in response to studies that showed a high incidence of drug and alcohol abuse within the railroad industry, creating a serious safety hazard. According to one study, apparently unchallenged, 23 percent of operating personnel were "problem drinkers"; thirteen percent reported to work at least "a little drunk" and five percent "very drunk" during the study year; and one in eight drank at least once while on duty. 489 U.S. at 607, n.1. Another unchallenged study, conducted without the benefit of regular, post-accident testing, "identified 34 fatalities, 66 injuries and over $28 million in property damage (in 1983 dollars) that resulted from the errors of alcohol[-] and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983." *Id.* at 608.

Various labor groups sued to enjoin the regulations, arguing that the Fourth Amendment prevented the government from testing employees without individualized suspicion of drug use. The Court concluded, however, that the government's interest in random testing sufficiently outweighed the employee's privacy expectations to justify relaxing the traditional suspicion requirement. The Court described the government's interest in testing -- preventing train wrecks -- as, variously, "compelling," *id.* at 628 and 633, and "surpass-

ing," *id.* at 634. It also noted that the targeted employees are engaged in "safety-sensitive tasks," *id.* at 620, 629, and 633, and "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 628. These employees, like those "who have routine access to dangerous nuclear power facilities," are capable of causing "great human loss before any signs of impairment become noticeable to supervisors or others." *Id.*

The Court went on to say that these proven and persuasive safety concerns outweighed the privacy intrusions from the proposed blood and breath tests which, the Court noted, reveal no facts in which the employee has a substantial privacy interest, except the presence of alcohol or controlled substances. *Id.* at 626. The urine tests, however, presented a "more difficult question," and "raise[d] concerns not implicated by blood or breath tests." *Id.* The Court allowed that it "would not characterize these additional privacy concerns as minimal in most contexts." *Id.* It noted, however, that the FRA regulations endeavor to reduce the intrusiveness of the collection process. For one thing, the regulations do not require a monitor to observe the employee while the urine sample is produced. For another, they allow the sample to be collected in a "medical environment, by personnel unrelated to the railroad employer." *Id.* at 627-28. The collection procedures were, therefore, "not unlike similar procedures encountered often in the context of a regular physical examination." *Id.* at 627. The Court also noted that railroad employees have a diminished expectation of privacy "by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.* at 627. These employees, the Court noted, "have long been a principal focus of regulatory concern." *Id.* at 628.

Von Raab involved a drug-testing program for customs agents who: (1) are directly involved in drug interdiction, (2) carry firearms, or (3) handle classified material. 489 U.S. at 660-61. Citing *Skinner*, the Court reiterated that drug-testing is a search and that "a search must be supported, as a general matter, by a warrant issued upon probable cause." *Von Raab*, 489 U.S. at 664. It also reiterated that, in exceptional cases, where the government's interest in testing outweighs the individual's privacy expectations, the government may proceed without the presumptively necessary warrant and suspicion. *Id.* at 665-66.

Applying this balancing test, the Court first concluded that the government has a "compelling" interest in preventing drug use by customs agents involved in drug interdiction. The Court noted that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," *id.* at 668, and that "[t]he physical safety of [Customs] employees may be threatened, and many may be tempted not only by bribes from traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service," *id.* at 669. Therefore, "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.*

The Court also found that the government has a compelling interest in preventing drug users from promotion to positions that require the employee to carry firearms. "Customs employees who may use deadly force plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'" *Id.* at 670, quoting *Skinner*, 489 U.S. at 628.

Against these "compelling interests in safety and the integrity of our borders," 489 U.S. at 672, the *Von Raab*

Court balanced the employees' expectations of privacy. Those expectations were "diminished," the Court said, because "[u]nlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity[,] and [m]uch the same is true of employees who are required to carry firearms." *Id.* at 672. Moreover, the Court said, the agency's drug-testing procedures were carefully designed to minimize the program's intrusiveness. First, the employee is given five-days advance notice of the time and place for collecting the urine sample, *id.* at 664, thus reducing to a minimum any 'unsettling show of authority'. . . that may be associated with unexpected intrusions on privacy." *Id.* at 672, n.2. Second, the employee is not directly observed while urinating and, indeed, is allowed to produce the urine sample in the privacy of a bathroom stall. *Id.* at 661, 672, n.2. Third, the employee is not required to disclose the use of licit drugs, which may affect the test results, unless and until the specimen tests positive for illicit drugs and, even then, the licit drug information is given to a licensed physician, not to the Customs Service. *Id.* at 672, n.2. Finally, the sample is collected by an "independent contractor," *id.* at 661, not someone in the Service. "Taken together," the Court said, "these procedures significantly minimize the intrusiveness of the Service's drug-screening program." *Id.* at 672, n.2.

In light of these procedural safeguards and the "extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require carrying firearms or the interdiction of controlled substances," *id.* at 674, the Customs Service was justified in testing applicants for such positions without the usual requirement of individualized suspicion of wrongdoing.

The Court was unable to determine whether the Service was also justified in testing applicants for positions that han-

dle "classified material" which, under the agency's scheme include, among others, accountants, animal caretakers, attorneys, baggage clerks, co-op students, mail clerks, and messengers. *Id.* at 678. The Court said these employees are subject to urine testing if they have access to "truly sensitive information." *Id.* at 677. It remanded the case to the lower courts to determine whether the designated positions do in fact allow access to such information.

D. The District's Drug-Testing Program Is Unreasonable

The District contends that its drug-testing program serves a "special need" beyond the normal need for law enforcement: namely, to reduce the risk of drug-related athletic injuries. Assuming that is true,[13] the District's special need does not necessarily mean that the program is constitutional. Whether it is constitutional depends on whether the District's interest in testing without suspicion outweighs the students' privacy expectations. *Skinner*; *Von Raab*. The District agrees that this is the proper test. Pet. Br. at 32. So does the Solicitor General. Br. for the United States at 12-16 and n.2. For reasons that follow, the Court should conclude that, in this case, the students' privacy interests outweigh the District's interest in suspicionless drug testing and, therefore, that the testing program is unconstitutional.[14]

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[13] Although the District asserts in its brief that test results will not be disclosed to law enforcement authorities, the written description of the policy does not contain the same assurance. (J.A. 7-9).

[14] The various *amici* supporting the District have offered several off-record reports of drug problems nationally and in other school districts. Even if this evidence is properly subject to judicial notice, it is not relevant to the question at hand: whether Vernonia's drug-testing program which, as explained *infra*, is much more intrusive than other programs, is a reasonable and hence constitutional response to *its* drug "problem."

(continued...)

1. The District's Program Is A Substantial Invasion Of Privacy

The compelled production and testing of urine is an extreme invasion of privacy, no less so for minors than adults, and no less so for athletes than nonathletes. The District's drug-testing program heightens the intrusion by requiring students to excrete on demand and under observation by school officials, not independent monitors, and by requiring the students to disclose to the officials their prescription medications.

(a)

Drug-testing by urinalysis intrudes deeply on settled expectations of privacy. The Court made that clear in *Skinner*:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it in euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

489 U.S. at 617, quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987). *See also Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting)("I think it obvious that [urine testing] is a type of search particularly destructive of privacy and offensive to personal dignity").

Oregon takes the same view. In *Sterling v. Cupp*, 44 607 P.2d 206, 208 (Or.App. 1980), *aff'd as modified*, 625 P.2d 123 (Or. 1981), Judge Gillette, now a Justice on the Oregon Supreme Court, wrote: "[t]he final bastion of privacy is to be found in the area of human procreation and excretion, and the nudity which may accompany them. If a person is entitled to any shred of privacy, then it is to privacy as to these matters."[15]

As intrusive as drug-testing is for adults, it is just as intrusive, if not more so, for middle school students. Our culture instills early in children a keen sense of privacy in excretory functions. By first grade, they expect, and are expected, to urinate in seclusion, using segregated bathrooms, the same as adults. Adolescents are often extremely self-conscious about their developing bodies and its functions, especially when they reach puberty.

The Court has said that "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief intrusion upon cherished personal security, and it surely must be an annoying, frightening, and perhaps humiliating experience." *Terry v. Ohio*, 392 U.S. at 24-25. Drug testing by urinalysis must be all that and more, for both adults and minors.

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[14] (...continued)
Although drugs are a national concern, the scope of the problem varies substantially from school district to school district, as the *amici*'s own evidence proves. Accordingly, this Court need not decide whether a drug-testing program of the type at issue here would be constitutional in a different school district with a different drug record. The Court should thus decline the *amici*'s invitation to make a one-size-fits-all rule that does not account for differences in drug programs and drug problems.

[15] Drug testing by urinalysis is so intrusive that at least sixteen states and five cities have enacted laws to regulate it. *See* K. Zeese, DRUG TESTING LEGAL MANUAL §1.05[3] (rel. #2, Nov. 1994). Three states require probable cause before an employer can compel an employee to take the test. *Id.* at 1-42. Four states and two cities require, among other things, that the employer have some reason to suspect the employee is using drugs or is drug-impaired. *Id.* at 1-43 to -44.

(b)

The privacy intrusion does not end when the urine sample is collected. Indeed, the most significant privacy interest affected by urinalysis may be the information contained in the urine. As noted in *Skinner*, "chemical analysis of urine, like that of blood, can reveal a host of private medical facts about [a person], including whether she is an epileptic, pregnant, or diabetic." 489 U.S. at 617. Over time, technological advances in urinalysis are sure to make the test even more revealing and, hence, even more intrusive.

The District, however, does not limit itself to the information to be gleaned from the urine sample. It also requires students to disclose any prescription medications they may be taking. (J.A. 8). By this simple expedient, the District learns, even without urinalysis, information that is generally held in strict confidence and that is completely unrelated to the one secret the District says it is trying to discover: whether the student is taking illicit drugs. For example, if a student reports that he is taking AZT, the school thus will have learned that he is infected with the AIDS virus. Similarly, if the student discloses that she is taking birth control pills, school officials will then know that she is sexually active and probably heterosexual. This is information which the school has no right to know[16] and, moreover, is information that serves no purpose in preventing drug-related athletic injuries. The drug-screening program for Customs agents, upheld in *Von Raab*, likewise requires the disclosure of licit drug use, but only after the urine sample tests positive for illicit drugs and, even then, the information

[16] It is unlawful to require a student to submit to a psychiatric or physiological examination for the purpose of determining, among other things, the student's "sex behavior and attitudes." 20 U.S.C. §123h(b)(3).

is disclosed only to a licensed physician, not to the Customs Service. *Von Raab*, 489 U.S. at 672, n.2.[17]

(c)

The District's test procedures are much more intrusive than the procedures upheld in *Skinner* and *Von Raab*. In the first place, the District's program requires students to produce urine on demand and under observation. Each week the school draws the names of the students to be tested. Those students are taken from class that same day, escorted to the locker room, handed a specimen bottle, and instructed to fill it while the monitor waits. A student who cannot urinate immediately is allowed to return to class, but must come back later in the day to try again under the same stressful conditions as before. (J.A. 32).[18] By comparison, the Custom Service's drug test, at issue in *Von Raab*, provide for five days advance notice of the time and place for collecting the urine sample. This provision was important, the Court said, in reducing the intrusiveness of the Service's program. 489 U.S. at 672, n.2.

Male students in Vernonia suffer the added indignity of

[17] The drug-testing program for railroad workers, upheld in *Skinner*, requires employees to disclose, at the time they produce blood and urine samples, "whether they have taken any medications during the preceding 30 days." 489 U.S. at 626, n.7. It is not clear from the opinion whether they are required to disclose *which* medications they have taken. In any event, this information is disclosed to the medical personal retained to conduct the test, who then forward it to the FRA's laboratories. The information is apparently not shared with the worker's employer.

[18] In *Schaill v. Tippecanoe County School Corp.*, 679 F.Supp. 833 (N.D. Ind. 1988), *aff'd*, 864 F.2d 1309 (7th Cir. 1988), which involved a drug-testing program for high school athletes and cheerleaders, there was evidence that some students suffer such stress while standing at the urinal that they are unable to void their bladder for up to two or three hours. 679 F.Supp. at 843.

being observed while they urinate. The test monitor accompanies the student to the urinal and stands a short distance behind, watching and listening at least some of the time. To be observed while urinating is, of course, an extreme invasion of privacy, which is why the Court found it significant, in both *Skinner* and *Von Raab*, that the drug-testing protocol did not require the employee to be observed while producing the urine sample. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672 n.2. Indeed, the *Von Raab* test allowed the employee to produce the sample in the privacy of a bathroom stall.[19] In our society, it is degrading to be observed while urinating, even from behind.[20]

It is even more degrading when the observer is someone in a position of authority to the person forced to urinate, which is the case in Vernonia. The monitors there are teachers, administrators, and coaches. By comparison, the Custom Service authorizes an "independent contractor" to collect the urine sample. *Von Raab*, 489 U.S. at 661. The FRA requires the sample to be collected in an "independent medical facility," *Skinner*, 489 U.S. at 609, by personnel "unrelated to the railroad employer." *Id.* at 626-27. Even the Institute for a Drug-Free Workplace, one of the Nation's foremost proponents of drug testing and an *amicus curiae* in support of the District, agrees that the collection of urine

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[19] In *Schaill v. Tippecanoe County School Corp*, which upheld a drug-testing program for high school athletes, the court placed great importance on the fact that the program allowed only aural, not visual, monitoring of the urine sample being produced. 864 F.2d at 1318.

[20] In George Orwell's famous novel, *1984*, he describes a "negative utopia" in which the citizenry have lost all privacy. The government -- "Big Brother" -- watches everyone through "telescreens" mounted on the walls. The screens are everywhere, including the water closet: "There was no place where you could be more certain that the telescreens were watched continuously." Eric Blair a.k.a. George Orwell, *1984* 89 (New American Library 1981).

samples should be "conducted by independent trained professionals at an independent site" in order to limit the intrusion on privacy. Br. of Inst. for a Drug-Free Workplace at 12.

(d)

The District's drug-testing program is all the more intrusive because it regulates conduct that the District has no right to regulate and, moreover, has expressed no interest in regulating -- namely, off-campus, after-hours drug use that does not result in drug-impairment during class or a District-sponsored athletic event. Drug use is regrettable, of course, no matter where or when it occurs, but this conduct does not threaten school discipline or athletic safety, the District's stated concerns, and thus does not justify its program of round-the-clock surveillance. The District has little or no interest in student conduct *outside* of school, where parents and other authorities are in charge, if it does not affect student conduct *inside*. *Compare Von Raab*, 489 U.S. at 674 (because of its "almost unique mission," the Customs Service has a "compelling interest in ensuring that [agents covered by its drug test] do not use drugs even off duty").

(e)

The District argues that its drug-testing program is not a substantial invasion of privacy because: (1) students have a substantially diminished expectation of privacy in their urine; (2) athletes in particular have far fewer privacy interests; (3) the program is nonpunitive and confidential; (4) the collection procedures are minimally intrusive; and (5) participation in school sports is voluntary. None of these arguments, addressed in turn below, withstands scrutiny.

(1) The District argues that minors surrender their privacy expectations when they pass through the schoolhouse gate, because the "process of educating young people is inherently invasive." Pet. Br. at 39. "A teacher," the District

says, "simply cannot do his or her job without constantly and pervasively intruding into privacy interests [of students]." *Id.* at 40. Therefore, the District argues, students must have a substantially diminished expectation of privacy. This Court rejected a similar contention in *T.L.O.* In that case, the State of New Jersey argued that, "because of the pervasive supervision to which children in the schools are necessarily subject, a child has virtually no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into school." 469 U.S. at 338. This argument, the Court said, was based in part on the "seriously flawed" premise that student privacy is fundamentally incompatible with maintaining a sound educational environment. *Id.* The Court also said: "Although we may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy." *Id.* The Court went on to hold that, because students have legitimate expectations of privacy, school officials cannot search students without some suspicion of wrongdoing. *Id.* at 341-42.

To be sure, students in school have less expectation of privacy than adults in other settings. That, of course, was part of the reason that *T.L.O.* authorized school officials to search students with less suspicion than probable cause.[21] But even if a student's privacy expectations are not on par with an adult's, they are still substantial. "A search of a child's person . . . *no less than a similar search carried out on an adult*, is undoubtedly a severe violation of subjective

[21] Oregon has not followed *T.L.O.* in construing the state constitution. In *State ex rel. Juvenile Dep 't v. DuBois*, 821 P.2d 1124, 1126-27 (Or. App. 1991), the court held that Article I, section 9, unlike the Fourth Amendment, does not permit school officials to search an individual student without a warrant or probable cause, unless "exigent circumstances" or some other historical exception applies.

expectations of privacy." *Id.* at 338 (emphasis added). Thus, the District greatly overstates its case when it suggests that school-age minors have substantially diminished expectations of privacy.

It also overgeneralizes. Students may have a diminished expectation of privacy in some things, but not others. For example, the District has put its students on notice that their lockers belong to the school and thus are subject to routine inspections. (Pl. Ex. 2 at 21).[22] But nothing in the students' school experience gives them reason to expect that their urine is open to inspection as well. To the contrary, they have a real and legitimate expectation that this most private of human activities is off limits to others even while they are in school. They are not routinely observed while urinating there, and school officials do not ordinarily have access to their urine for analysis.

Even if students' privacy expectations are diminished inside the schoolhouse, they remain intact outside. The District does not contend otherwise. Nevertheless, its drug-testing program intrudes on students' activities off-campus and after school hours. As noted above, the test does not discriminate between drug-impairment in class or during school sports and drug-impairment at other times or places, including the student's home. Drug use anytime anywhere will produce a positive test result and trigger the prescribed penalties. Thus, the drug test reaches beyond the time (the schoolday) and the place (the schoolhouse and yard) where

[22] The handbook also provides that a "[s]earch of the student's person or possessions will be limited to the situation where there is reason to believe that a student is hiding evidence of an illegal act or a school violation." (Pl. Ex. 2 at 14). This provision, if nothing else, gives students an expectation of freedom from suspicionless searches while on school grounds.

the District now argues that students have a diminished expectation of privacy.[23]

(2) The District argues that athletes in particular have a reduced expectation of privacy in either their urine or the act of urinating, because, the District says, school sports are so highly regulated. In fact, the District's athletic regulations are trifling. To play sports students must have a physical examination, keep up their grades, and obtain health insurance or sign an insurance waiver. (R. 61-62; Pl. Ex. 5 at 63).[24] That's it. These minimally intrusive rules do not compare to the pervasive federal and state regulations governing railroad employees, which led the *Skinner* Court to conclude that they lose some expectation of privacy in their urine when they report to work. 489 U.S. at 627-28. As the court of appeals correctly noted below, the District's rules "are not the sort of extensive government regulation that has been found to diminish the expectation of privacy of workers in high risk industries or high security areas of the government." 23 F.3d at 1525 (Pet. App. 53a-54a)(citations omitted). "High school athletes," the court continued, "do not go through extensive background checks in order to join their teams." *Id.* The District is unable to point to anything in its athletic rules that would prepare students for the District's demand to excrete under supervision so the

[23] The time it takes for drugs to become undetectable in urine varies with the individual, but can last as long as 22 days. *Von Raab*, 489 U.S. at 676. Since the District begins testing at the start of each school quarter, it is possible for a student to test positive based on drug use during vacation.

[24] Athletes are also required to observe training rules set by the coach, which the District suggests are rigorous and intrusive. But there is no evidence that the coaches have in fact set *any* training rules, let alone rigorous or intrusive ones. Even while alluding to these unspecified rules, the District does not suggest that any of them concern athletes' excretory functions.

fluid can be examined for the secrets within.

Continuing its athletes-have-fewer-rights argument, the District states that the mandatory, pre-season physical examination "includes urinalysis." Pet. Br. at 41. The word "includes" should not mislead the Court, as it did the Solicitor General, *see* Br. of United States at 24, to assume that urinalysis is a ***required*** part of the examination. It is not. James testified that he gave a urine sample during his exam (J.A. 17), but no one testified that he had to or that anyone else did. The district superintendent testified that athletes must have a physical exam, but he did not know what the exam entailed. (R. 62-63). In any event, James produced his urine sample unobserved in the privacy of a bathroom stall and gave it to his physician, with whom he has a confidential relationship. (J.A. 17-18). Whatever tests were conducted on the specimen -- and nothing in this record identifies them -- the results could not be disclosed, to school officials or anyone else, without the consent of James or his parents. Far from proving that James has no expectation of privacy in his urine, the circumstances of his pre-season examination prove that he does. The District notes that drug testing for steroids and other performance-enhancing drugs has become more common in collegiate, Olympic, and professional athletics, where the Fourth Amendment generally does not apply. *But cf. University of Colorado v. Derdyn*, 863 P.2d 929 (Colo. 1993), *cert. denied*, __ U.S. __ (1994) (upholding a Fourth Amendment challenge to a drug-testing program for university athletes). This proves nothing except that, if James ever succeeds to that high level of athletic competition, he may expect, *then*, to give up some privacy; it does not prove that he has given it up now.

(3) The District argues that its drug-testing program is "minimally intrusive" because it is "non-punitive" and "confidential." In fact it is neither. Students who flunk the test are forced to quit sports or to submit to drug counseling and

weekly urinalysis. Those who flunk a second or third time are not even given that Hobson's choice -- instead, they are automatically kicked out of the sports program for two or more seasons. Most students would consider that punishment. Indeed, suspension is the *prescribed* punishment for students who demonstrate poor sportsmanship, misuse the school's athletic equipment, or otherwise breach the its rules for athletes. (Pl. Ex. 5 at 63). What is punishment in the one context is also punishment in the other.[25]

As the District itself concedes, "community life [in Vernonia] centers around the schools, with interscholastic athletics playing a dominant role." Pet. Br. at 3. Therefore, to be denied the right to participate in school sports is, in effect, to be excluded in part from the community. That cannot be viewed as anything *but* punishment. What is more, it is *public* punishment. It is true that the District does not publish the test results. But in a small town such as Vernonia, where community life revolves around the schools and school sports, everyone will know when a student tests positive, because it will be obvious that the student, once on the team, no longer is. The "secret" will inevitably get out, starting with the student's teammates and spreading from there.

The fact that the District does not report test results to the police for law enforcement purposes -- if it is a fact, *see* note 13, *supra* -- does not support its contention that the privacy expectations of athletes should be discounted in the weighing of individual and governmental interests. To do so would overinflate the government's side of the balance,

[25] The fact that the District calls each positive test an "offense" and that the length of the suspension increases with the number of offensives, (J.A. 9), further undermines the District's contention that the drug-testing program is nonpunitive.

as the Colorado Supreme Court explained while striking down a random drug-testing program for university athletes:

> It is true that an intrusion by the government outside the context of criminal law enforcement is generally less of an intrusion than one for the purposes of law enforcement. However, as a matter of law, we already take this fact into account when we analyze this case according to the standards of *Skinner* and *Von Raab*, rather than according to the standards of the typical cases in the area of criminal procedure . . . . In other words, were we to attribute less weight to the students' privacy interests because this is not a criminal case, and also start with the premise that *Skinner* and *Von Raab* control, we would be, in effect, giving double weight in our analysis to the fact that we are not dealing with an issue in criminal procedure . . . .

University of Colorado v. Derdyn, 863 P.2d at 942.

(4) The District contends that its drug-testing program is minimally intrusive because the conditions under which athletes are tested are essentially the same as using a public restroom or locker room. Pet. Br. at 42. But, of course, there are substantial differences. A person urinating in a public restroom is not forced to do so, is not subject to visual and aural monitoring and, most importantly, does not surrender the urine for analysis by government officials. In public facilities, individuals blend into the crowd; they are not singled out for observation. Indeed, it is considered taboo even to appear to be observing others in a public restroom. People avert their eyes from one another; they attend to their own needs and then leave. For most schoolchildren, there is a world of difference between using a public facility

and being ordered to fill a specimen bottle while a teacher watches and listens.[26]

(5) Finally, the District contends that its drug-testing program is minimally intrusive because it applies only to students who "voluntarily" engage in school sports and thus can be avoided by students who object to it. Pet. Br. at 42-43. To be sure, the program is less intrusive than it would be if it applied to all students and thus was unavoidable. But even as applied to athletes only, the intrusion is still extreme, considering what students must give up to escape testing: participation in school sports. That is a very high price to pay for asserting a constitutional right. As the District superintendent testified, playing school sports is an "important part of the school experience." (Pl. Ex. 5 at 7; *see also* J.A. 20). The court below made the same observation: "Participation in athletics is obviously highly desirable and encouraged, as this record shows. The fact is that parents wish to have their children obtain the physical and mental benefits of organized sports. That, too, is part of the educational process; part of what tax dollars pay for." 23 F.3d at 1525 (Pet. App. 55a).

The District cites *United States v. Martinez-Fuerte*, 428 U.S. 543, for the proposition that a search is unintrusive as a matter of law if it can be evaded, somehow, anyhow. But that is not, in fact, the holding of that case. *Martinez-Fuerte* allowed immigration officials to briefly detain motorists at fixed checkpoints near the border to inquire whether they were in this country legally. The Court described this as minimally intrusive compared to a full-scale search of the person. *Id.* at 558. It also noted that motorists who object to even that much intrusion can learn in advance where the

[26] Adults, too, use public restrooms, but the District does not contend that adults have thereby lost all expectation of privacy in their urine or the process of excreting it.

checkpoints are and take other roads to avoid them. *Id.* at 559. This was not, of course, the decisive factor in the Court's ruling. Nevertheless, the District makes much of the fact that its students, like the motorists in *Martinez-Fuerte*, can avoid the drug test by not going out for school sports. What the District overlooks, of course, is that students in Vernonia, *un*like the motorists in *Martinez-Fuerte*, cannot avoid the test *and still get where they were going*. There are no "other roads" for students who want to participate in organized athletics. The District's sports program is, so to speak, the only game in town, a point the District concedes at page 3 of its brief: "Because of its size and location, the town has few recreational opportunities or organized entertainment programs for elementary and high school students."

In sum, the fact that the District's drug test can be avoided -- because it applies only to students who play sports and playing sports is "voluntary" -- does not significantly diminish the privacy intrusion.[27]

2. The District's Interest In Drug Testing Is Not Compelling

The privacy interests affected by the District's drug-testing program are significant, as explained in the preceding section. By comparison, the District's interest in maintaining the program is slight.

[27] Just as students do not *have* to play school sports, people who work for the Customs Service do not *have* to work there; they can seek employment elsewhere and, therefore, their employment is "voluntary," too, under the District's analysis. Even so, Customs agents do not surrender their privacy interests when they hire on. If they did, *Von Raab* would have been a much easier case to decide.

(a)

The District says that its interest in drug testing, to be balanced against the students' interest in privacy, is preserving the safety of its athletes. But that, of course, is incorrect. It is not athletic safety that should be weighed in the balance, for the District is free to pursue that goal by traditional methods, including education and counseling, and perhaps even drug testing on suspicion of drug use. Rather, the interest to be entered on the District's side of the balance is the "cost" of pursuing that goal *without* suspicion*less* drug testing.

The surest way to measure this cost is to compare the number of drug-related athletic injuries before the drug-testing program and the number of such injuries after, since the test was in effect for several years before the trial of this case. A substantial drop-off after the test might indicate that it is an efficient means to its stated end and thus would be costly to discontinue. The record, however, does not indicate a drop-off. Although there is no evidence of a drug-related athletic injury *after* testing began, neither is there evidence of any such injuries *before* it began. The District suspects that one wrestler was injured while on drugs, but that suspicion was never confirmed, as noted earlier. Measured against its goal of reducing injuries from drugs, the District's drug-testing program has little apparent value, and so the District's interest in continuing the program is slight.

(b)

Even if the drug-testing program were an efficient means to its stated end -- safer sports -- the end itself "suffer[s] by comparison" to the ends of the drug-testing programs upheld in *Skinner* and *Von Raab*, as the court below correctly noted. 23 F.3d at 1526 (Pet. App. 56a). The goal of the *Skinner* program, which this Court found barely sufficient to justify urine testing, as opposed to less intrusive

blood and breath testing, 489 U.S. at 625-27, was to prevent train wrecks and their attendant loss of life and property damage. In *Von Raab*, the goals were preserving the integrity of the Nation's borders and preventing the misuse of deadly weapons. Accordingly, the Court could say in *Skinner* and *Von Raab* that the employees covered by the drug tests there hold "safety-" or "security-sensitive" positions and "discharge duties fraught with such risks of injuries to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628; quoted with approval in *Von Raab*, 489 U.S. at 670. These precedents make clear that our precious Fourth Amendment freedoms do not give way except to the most compelling safety and security concerns.

That point is bolstered by *Von Raab*'s conclusion that drug testing may be unconstitutional for Custom Service employees who are not engaged in front-line drug interdiction and do not carry firearms. No doubt some of the employees in this group -- which includes messengers -- operate motor vehicles, either on- or off-duty, which is unquestionably a more dangerous activity than middle- and high-school athletics. Even so, these employees could not be compelled to submit to a urine test under the Service's screening program without some proof that they were likely to gain access to "sensitive information" and thus pose a threat to national security. *Id.* at 677-78.

The District's concern for the safety of student athletes, albeit well-intentioned, simply does not rise to the level of the safety concerns that were found sufficiently compelling in *Skinner* and *Von Raab* to justify so serious an invasion of privacy as the compelled production and testing of urine. There certainly is no risk of harm on the order of a train wreck or gun battle if a student athlete competes while drug-impaired. Indeed, the District's experience shows that there is little risk of any injury, let alone a serious one; as

noted earlier, the District cannot prove a single drug-related athletic injury in the history of its sports program. Even if there were some drug-related injuries that escaped detection, they could not have been very serious. The District's athletic director testified that the typical injury in the girl's sports program (which includes volleyball, cross country, basketball, track, and golf) was a "muscle-type" injury, such as a "pulled muscle" from "improper warmup" or a "torn ligament or cartilage." (J.A. 43-44). The boy's sports program includes the same sports (excepting volleyball) plus football and wrestling. The District offered no evidence that the typical injury for boys is more serious than the typical injury for girls, so the Court should assume that it is not more serious. No injury should ever be taken lightly, of course, but the government's interest in preventing pulled muscles and torn ligaments is not equal to its interest in preventing loss of life or breaches of national security.

The District argues, correctly, that just because there have not been any serious, drug-related injuries does not mean that there could not be any. The issue, however, is not whether such an injury *could* happen, but the likelihood that it will without drug testing. Nearly everything is possible, but not everything is probable, and some things are very *im*probable, if experience is any guide. The District's sports program has no history of drug-related injuries, even before its drug test. On this record, therefore, the probability of future injuries if testing stops must be slight, if calculable at all. Fourth Amendment rights should not be lost to mere speculation about potential harm.[28]

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[28] The *Skinner* Court demanded more than speculation. As noted above, the drug-testing program at issue there was supported by unchallenged studies showing both a high incidence of drug use among railroad workers -- one of eight drank on the job and eighteen percent reported for work either "very drunk" or at least "a little drunk," 489 U.S. at 607 n.1

(continued...)

Recognizing the holes in the record, the District notes that illicit drugs can be harmful to minors aside from their potential for causing sports injuries. Drugs, the District says, can interfere with memory, sensation, and perception, and can "lead people to take risks, to be careless and impulsive and to disregard instructions," Pet. Br. at 30 and 31, n.2, depending, of course, on the type of drug and when and how it is used. But this, of course, is true for both young and old drug users and for both athletes and nonathletes. If that potential, generalized harm were sufficient to justify random drug testing, then *everyone* would be subject to urine testing regardless of age or occupation, and *Skinner* and *Von Raab* would just be so much spilt ink. *Von Raab* makes clear, however, that not everyone *is* subject to testing: customs agents, for example, are immune if they are not directly involved in drug interdiction, do not carry firearms, and do not have access to sensitive information. That holding cannot be reconciled with the District's argument that the physiological and psychological effects of illicit drugs are sufficient alone to permit drug testing for any potential user.

(c)

The District's interest in its drug testing program is diminished substantially by its failure to prove a high incidence of drug use within its sports program. Some groups targeted for drug testing are engaged in such ultra-hazardous activities that even a single, drug-impaired individual can cause catastrophe -- airline pilots, railroad engineers, and nuclear reactor operators come quickly to mind. Accordingly, the government may be justified in testing these groups

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[28] (...continued)
-- as well as a clear connection to railroad safety -- drug-impaired workers caused *at least* 34 fatalities and $28 million in property damage in just eight years. *Id.* at 608.

even without evidence that many, if any, group members actually use drugs. The Court made this precise point in *Von Raab* in response to the contention that the Custom Service drug test was unjustified without proof of frequent drug use by customs agents: "The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity," given the "substantial" harm the program seeks to guard against. 489 U.S. at 674-75. But for groups engaged in less hazardous activities, where the potential harm from a drug-impaired individual is relatively minor -- pulled muscles and torn ligaments, not plane crashes, train wrecks, or reactor meltdowns -- the lack of evidence of frequent drug use within the group substantially reduces the government's interest in subjecting all group members to the indignity of drug testing.

(d)

The District's interest in dragnet drug testing, slight to begin with, is diminished further by the limited utility of its testing program. The test does not cure drug use, nor does it prevent athletes from competing while on drugs. The only way to prevent that is to test each student in advance of each athletic event, as the District's own expert agreed. (Def. Ex. 106 at 81). *See also Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F.Supp. 759, 765 (S.D.Tex. 1989), *aff'd without published op.*, 930 F.2d 915 (5th Cir. 1991). Drug testing is simply a means of detecting those who use drugs. As such, it offers some deterrence to drug use, including use in athletic competition. But there are already several substantial deterrents. First and foremost is the usual fear of getting caught, which is possible, of course, without random drug testing. Another existing deterrent is that students who volunteer to play sports want to play well and thus will avoid using drugs in competition for fear of impairing their performance. They might take drugs outside of competition but, in that event, there is no risk of

a drug-related athletic injury which, again, is the District's announced concern. Finally, there is concern for personal safety. As the District itself observes, playing sports on drugs can increase the risk of injury. That fact is surely not lost on most athletes and, therefore, most will avoid drugs in competition for fear of getting hurt. "It is, of course, the fear of the accident, not the fear of a postaccident revelation, that deters." *Skinner*, 489 U.S. at 651 (Marshall, J., dissenting). All things considered, the District's drug-testing program provides little added deterrence to the use of illicit drugs in school sports.

What little deterrence it does add is compromised substantially by the limitations of the District's drug test. It covers only a few drugs -- marijuana, amphetamines, cocaine, and occasionally LSD -- conspicuously omitting alcohol, the one drug that everyone agrees is most readily available to and most often abused by both minors and adults, as well as steroids, the drug that is most commonly used by athletes seeking to enhance their performance. Thus, if there are athletes who want to compete under the influence of drugs -- and the District has not proved there are any -- the drug test will not deter them; they will simply switch to alcohol or drugs not covered by the test.[29]

(e)

Even if the District's drug-testing program were an efficient means to a compelling end, the availability of a less

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[29] Yet another limitation of the test is that it merely indicates whether a student has taken one of the targeted drugs at some time in the recent past. It does not indicate how much the student took or when, or whether it was enough to cause any impairment, let alone substantial impairment, at any given point in time. The test is not like a blood alcohol test, which determines not only whether a person has alcohol in his blood, but also how much alcohol is there -- whether, in particular, there is enough to put the person over the "legal limit," at which point substantial impairment can be presumed or proven.

intrusive means to the same end -- namely, drug testing on suspicion of drug use -- substantially diminishes the District's interest in the program. The District argues that suspicion-based testing, which it has not tried (J.A. 35), is unworkable because, it says, school officials cannot formulate, through observation alone, a reasonable suspicion that a student is drug-impaired. But the whole premise of its drug-testing program is that they *can* do that. As explained earlier, the District adopted the program after it concluded that it had a drug problem. The basis for that conclusion was an apparent rise in the number of unruly students. These students, or most of them, the District says, were unruly because of drugs. Obviously, then, the District *can* tell without testing who is on drugs, or at least it thinks it can: It is the unruly students. Either the District is wrong -- not all unruly students are on drugs -- in which case the foundation for its drug-testing program collapses: there is no drug problem. Or it's right -- all unruly students *are* on drugs -- in which case the foundation still collapses because, in that case, the District would not need to test anyone to determine who is on drugs, it would only need to observe who is misbehaving. At most, the District would have an interest in testing the students who misbehave and thus give reason to be suspected of using drugs. But it would have no rational interest in testing the students, like James, who are well-behaved.

The District can't have it both ways. It can't argue, on the one hand, that "[t]eachers and coaches cannot reliably detect drug intoxication by observation," Pet. Br. at 37, and then argue on the other hand that, based on observation alone, school officials know, or at least reasonably suspect, that a large part of the student body uses illicit drugs and, moreover, that *particular* students use them -- namely, the Big Elks, the Drug Cartellians, and "leading student athletes." Pet. Br. at 6. The court of appeals was unimpressed

with the District's we-can't-tell-without-testing argument, noting that "the testimony showed" that "teachers and administrators *could* detect behavior and physical problems that rather clearly appeared to be drug related." 23 F.3d at 1522 (Pet. App. 35a)(emphasis added).

In *Delaware v. Prouse*, 440 U.S. 625, the Court held that the police could not stop motorists without suspicion of wrongdoing to check for unlicensed drivers and unsafe vehicles. The Court noted that these "roving spot checks" serve an important end -- enforcing the motor vehicle code -- but concluded nevertheless that they are not "a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests such stops entail," "[g]iven the alternative mechanisms available." *Id.* at 659. The "foremost" of the alternatives, the Court said, "is acting upon observed violations." *Id.* Likewise, the "foremost" method for enforcing student conduct codes is acting on observed violations. The availability of that alternative enforcement mechanism diminishes the District's interest in random, suspicionless drug testing.[30]

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[30] In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), which upheld sobriety roadblocks, the Court explained that *Delaware v. Prouse* was not intended to approve "searching examination of the 'effectiveness'" of particular searches and seizures. *Sitz*, 496 U.S. at 454. Nevertheless, the Court went on to examine the results of the roadblock and concluded that it was at least as effective as the border checkpoint approved in *United States v. Martinez-Fuerte*, 428 U.S. 543. *Sitz*, 496 U.S. at 455. Furthermore, in its summation, the *Sitz* Court said that "the extent to which [sobriety roadblocks] can reasonably be said to advance [the State's interest in preventing drunk driving]" was part of the basis for its decision to approve such roadblocks. *Id.* Read together, *Prouse* and *Sitz* hold that the effectiveness of a search in achieving its stated goal is not dispositive, but is at least a factor to consider, in determining whether the search is reasonable under the Fourth Amendment. The District agrees. *See* Pet. Br. at 15-16 (citing "effectiveness" as one factor to balance in evaluating a search).

(f)

The District's brief refers occasionally to a second potential justification for its drug-testing program: maintaining order in the classroom. But that goal, on this record, is as defective constitutionally as the stated goal of athletic safety. The government has no less interest in maintaining order and productivity in its workplace than in its schools, especially for important agencies like the Customs Service. And yet that interest alone proved insufficient to subject all Customs employees to drug testing. *Von Raab*, 489 U.S. at 677-78.[31]

In any event, if the District's hidden agenda is to reduce disruptions in the classroom, it is difficult to see the logic of its drug-testing program. Teachers don't need drug tests to find out which students are being disruptive. If disruptive behavior is not obvious, then it's not disruptive behavior. Therefore, to deter disruptions, school officials can and should punish the perpetrators. It makes little sense, however, to respond to students who disrupt class with a drug test for only those students who go out for sports. Not all disruptive students play sports, so the test won't deter them from further misbehavior. And not all athletes who misbehave in class take drugs, so the test won't deter them either. Finally, not all athletes who take drugs misbehave in class, so subjecting them to the test won't reduce classroom disruptions. In short, the District's drug-testing program is not rationally related to its after-the-fact statement of purpose. As the court of appeals observed, "If the goal was to reduce drug use in the student body in general [as opposed

[31] The District claims that athletes are "role models" and "leaders" for the rest of the student body. Pet. Br. at 30. But this is another overstatement. Two-thirds of its high school students and three-fourths of its junior high students are athletes. *Id.* at 3. Not everyone can be a role model. And there can't be more students leading than being led.

to avoiding athletic injuries], testing athletes seems to be a considerably more roundabout way of reaching that goal." 23 F.3d at 1522 (Pet. App. 35a).

3. The Students' Interest In Privacy Outweighs The District's Interest In Testing

The District's drug-testing program is a extreme invasion of privacy. It compels students to engage in one of the most private human activities -- the excretion of urine -- on demand and under the watchful eyes of an adult authority figure, and then to surrender the urine to the government for chemical analysis. It also forces students to disclose their prescription medications, thus enabling school officials to discover, even without testing, the students' most private health secrets.

Balanced against these substantial privacy intrusions is the District's interest in reducing the risk of drug-related athletic injuries. On this record, that risk is slight, given that the District experienced no drug-related injuries in its sports program before the drug test began. Furthermore, the typical athletic injury -- often a pulled muscle, sometimes a torn ligament -- is a relatively minor harm, compared to the "disastrous consequences" that the drug test in *Skinner* was designed to prevent, 489 U.S. at 1419, or the "extraordinary safety and national security hazards" that the *Von Raab* test was intended to avert. 489 U.S. at 674. This combination of slight risk and minor harm produces a less-than-compelling argument for the District's drug-testing program, which is weakened further by the limitations of the test and the availability of less intrusive alternatives to the same goal. Accordingly, the Court should hold that the District's program violates the Fourth Amendment. To hold otherwise would mean that the Amendment has become frail protection indeed against government invasions of privacy.

CONCLUSION

The judgment below should be affirmed.

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OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

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STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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REPLY BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

I. THIS COURT SHOULD ACCEPT THE CONCURRENT FINDINGS

The Actons challenge the district court's findings of fact on sufficiency and hearsay grounds and urge this Court to reject the findings. However, findings of fact "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). When, as here, a court of appeals finds no clear error in a district court's findings, 23 F.3d 1514, 1519 (Pet. App. A at 20a), the findings of the two courts are concurrent. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). "This Court cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Id.*[1]

The Actons essentially argue that the only evidence the District could rely upon in deciding it had a drug problem was direct observation of drug use. They also suggest that the District's conclusion that a serious drug problem existed was based on "unconfirmed, second hand reports of off-campus drug use, almost all of it hearsay or hearsay within hearsay." (Resp. Br. at 3). The court of appeals rejected an assignment of error to that effect. 23 F.3d at 1519 (Pet. App. A at 20a). In addition, there is adequate evidence of a drug problem irrespective of the so-called "hearsay," including: (1) direct observations of "actions of athletes and others that were so far out of the norm that drug use was a logical inference," *id.* (Pet. App. A at 19a); (2) direct observations of students using and glorifying drugs; (3) testimony that athletes wrote class assignments admitting and glorifying drug use; and (4) actual arrests of athletes for drug use. (J.A. 46-47, 49-

[1] The Actons note that the court of appeals made some additional comments on the facts after finding no clear error. A court of appeals cannot undermine the legal effect of its finding of no clear factual error simply by recharacterizing the facts in its opinion.

50, 63-64).[2] While none of the Actons' witnesses (not even James Acton) denied that a serious drug problem existed in the District, the Actons single out and criticize each fact relied upon by the District as if each must be sufficient by itself to establish a drug problem. The determination of a drug problem, however, was based not on any one fact, but on the numerous facts and circumstances shown at trial.

More direct evidence of a drug problem exists here than in *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989) or *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In *Skinner*, the Court relied on findings of drug use by railroad employees nationally, without specific proof that each railroad whose employees would be tested had a problem. 489 U.S. at 607. In *Von Raab*, the Court relied entirely on possibilities, without evidence of any actual problem in the Customs Service. 489 U.S. at 683 (Scalia, J., dissenting). By contrast, the District established a serious drug problem in the very same locale where testing occurred. (Pet. Br. at 4-7; Def. Ex. 105). Such proof is more than the Court required in either *Skinner* or *Von Raab*.

II. THE ACTONS MISSTATE OR MISCHARACTERIZE SOME FACTS

The Actons' brief contains several mischaracterizations of the record evidence. The Actons suggest that the smell of marijuana in the wrestler's hotel room was the sole basis for the coach's concern that the injury was drug related. The coach also considered that the injury resulted from the wrestler's failure to execute a protective move

[2] The district court admitted and the court of appeals also considered evidence based on the reports of others, which the Actons claim both courts should have rejected. For example, Principal Aultman testified that students admitted using drugs to him and that the football coach told him that athletes had admitted drug use. (J.A. 22-24). As the court of appeals noted, Vernonia teachers and administrators "were told of incidents by others who were concerned and had no reason to lie." 23 F.3d at 1519 (Pet. App. 19a-20a).

he had practiced "probably a thousand times" and that he "didn't react like he had reacted a hundred times in the past." (J.A. 55-56).

The Actons claim only one witness testified to the need for mass expulsions and that his conclusion was "hyperbole." That witness, Principal Aultman, testified that he discussed mass expulsions with his staff, but they rejected that alternative because expelling students does not solve the problem (J.A. 26-27). No basis exists in the record for concluding that Mr. Aultman's statement was hyperbole.

The Actons suggest the District rushed into the testing program, "impatient for immediate results." (Resp. Br. at 1). In fact, the District's efforts to combat drug use prior to implementing the Policy—including classes, speakers and the like—spanned several years. (J.A. 25-26, 49, 63).

The Actons say that athletes were not required to give a urine sample as part of the pre-season physical examination. (Resp. Br. at 35). The evidence demonstrates that a physical exam was required, that James Acton took such an exam and that he provided a urine sample as part of the required physical. (J.A. 17; R. 61-62). Unless James Acton offered to give a sample, the only reasonable inference is that giving a urine sample was part of the required physical.

Finally, contrary to the Actons' assertion, the evidence shows that at the same time school officials noticed a drastic increase in drug use by students, including athletes, the frequency and severity of athletic injuries also increased. (J.A. 39). After the Policy was implemented, classroom decorum improved drastically and athletic injuries decreased. (J.A. 43, 50).

"what is reasonable [for Fourth Amendment purposes] depends on the context within which a search takes place," *T.L.O.*, 469 U.S. at 337, and because the context here is a public school, *T.L.O.* cannot be ignored.

The school setting demands "some easing of the restrictions to which searches by public authorities are ordinarily subject" and maintenance of order in schools requires "a certain flexibility in school disciplinary procedures." 469 U.S. at 340. The essence of *T.L.O.* is that "the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place," 469 U.S. at 340, tilts in favor of maintaining discipline and order. The interests of students may be invaded only to the extent "necessary to achieve the legitimate end of preserving order in the schools." *Id.* Just as *Skinner* allowed the Government to take "all necessary and reasonable regulatory steps to prevent or deter [performance of sensitive tasks while drug impaired]", 489 U.S. at 633, educators may take all reasonable steps to preserve order and protect their student athletes.

Drug use by students in the District created two significant problems: (1) athletes were endangering their safety and the safety of others on the playing field; and (2) the student body was in "a state of rebellion." 796 F.Supp. 1354, 1357 (Pet. App. B at 85a-86a). The District was entitled to take reasonable measures necessary to regain discipline and order in the school and, due to the government's "heightened obligation to safeguard students whom it compels to attend school," to protect the safety of its athletes. *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). This Court need not decide

urinalysis, in the abstract, "intrudes upon expectations of privacy that society has long recognized as reasonable," *Skinner*, 489 U.S. at 617, such an intrusion can be minimal as to those who "reasonably should expect effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672. Finally, deterrence is a valid goal of a drug testing program and a low incidence of positive tests establishes its success, rather than denying the existence of a problem. *Von Raab*, 489 U.S. at 672-673, n.3.

III. THIS CASE SHOULD NOT BE REMANDED TO THE COURT OF APPEALS

The Actons' complaint alleged violations of both the federal and state constitutions. (J.A. 5-6). The court of appeals noted that the Oregon courts have never decided a random drug testing case, leaving the court of appeals "without a compass that clearly points us in the right direction unless we use a federal compass." 23 F.3d at 1518 (Pet. App. 16a). Consequently, it "decide[d] the case based on federal law, confident . . . that Oregon would do no less." 23 F.3d at 1519 (Pet. App. A at 17a-18a). If this Court holds the Policy does not violate the Fourth Amendment, it should reverse rather than remand. The court of appeals was required to rely on the federal constitution when it decided this case. Because Oregon still has not decided a random drug testing search case, the court of appeals would be required to do the same thing today.

IV. SEARCHES IN THE PUBLIC SCHOOL SETTING SHOULD BE EVALUATED UNDER *NEW JERSEY v. T.L.O.*

Although this case involves a public school search, the Actons virtually ignore *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the case that governs such searches.[3] Instead, the Actons attempt to draw unfavorable distinctions between this case and *Skinner* and *Von Raab*. Those cases do concern the same type of search involved here, suspicionless drug testing by urinalysis, and thus provide significant guidance on many aspects of this case.[4] But

[3] The Actons do argue that the Oregon courts have rejected *T.L.O.* (Resp. Br. at 32, n.21). In the case they cite, however, the court did not reach the issue of whether to follow *T.L.O. State ex rel. Juvenile Dep't v. DuBois*, 821 P.2d 1124 (Or. App. 1991).

[4] *Skinner* and *Von Raab* resolved several issues regarding urinalysis drug testing. The Court acknowledged the impracticability, if not impossibility, of detecting drug intoxication by observation, *Skinner*, 489 U.S. at 628-629, and established that urinalysis drug testing, properly designed to minimize privacy intrusions, is a reasonable means for detecting and deterring drug intoxication. *Von Raab*, 489 U.S. at 676. The Court also established that while

whether, under *Skinner* and *Von Raab*, preventing a broken collar bone or a fatal arrythmia on the football field is more or less "compelling" than preventing a bullet wound at the border. The issue here is whether the Policy was a reasonable and necessary way for the District to address the problem of student drug use.

V. THE VERNONIA ATHLETES WERE SUBJECT TO A SIGNIFICANT RISK OF SERIOUS INJURY

The first premise of the Actons' argument that the risk of injury is slight is that the District's athletes were not taking drugs. The concurrent findings conclude that the District had a drug problem involving athletes (Pet. Br. at 29, n.23), and many facts in the record support those findings. (Pet. Br. at 6-7). There is also evidence of at least one serious drug related sports injury. (J.A. 54-56). The small number of positive tests "does not impugn the program's validity" because "when the goal of the Policy is deterrence," a low detection rate "is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 674, 675, n.3.

Playing sports creates risks of injuries including broken bones, spinal injuries, brain damage and even death. (J.A. 70-72).[5] It is uncontested that athletes playing sports on drugs pose a "substantially greater risk" to themselves and other athletes. (J.A. 68-69; Resp. Br. at 45). The Actons nevertheless claim that Vernonia athletes are subject only to risk of injuries said to be "typical" in non-contact sports, i.e., pulled muscles and torn ligaments. The risks associated with playing sports while on drugs are significant even in "non-contact" sports because potential sports injuries are not limited to trauma. Cocaine use creates a "substantial risk for cardiac arrest" or a "fatal arrhythmia." (J.A. 72). Cocaine and amphetamines have an unpredictable effect on the heart which can cause death even for someone engaged in volleyball or track. (Def. Ex. 106 at 28); *See also*, Br. of Nat. Leagues of Cities, *et al.*, at 11-12.

[5] Even in the District's golf program, a student was struck by a ball and another was hit by a club. (J.A. 48).

The Actons say the negative effects of drug use the District describes are experienced by all drug users and if "generalized harm were sufficient to justify random drug testing, then *everyone* would be subject to urine testing." (Resp. Br. at 43). The negative effects the Actons describe, while perhaps common to all drug users, pose enhanced risks to athletes. Public schools bear a heightened responsibility for educating and protecting their students, especially when they have reason to believe student athletes are using illegal drugs.

VI. THE STUDENT BODY WAS DISORDERLY LARGELY BECAUSE OF DRUG USE

The Actons do not refute the concurrent findings of unusually severe classroom disorder and discipline problems which made it difficult for the teachers to educate. 796 F.Supp. at 1357 (Pet. App. B at 85a-86a). The Actons simply argue that drug use did not cause the problem and accuse the District of concluding "that every unruly student is unruly because of drugs." (Resp. Br. at 4). When students, including athletes, suddenly and uncharacteristically begin to act defiantly and belligerently, boast in the halls and classrooms about drug use, confess their drug use to teachers, act unusually in class and on the playing field, and are even arrested for drug use, it is reasonable to conclude that the behavior problems in general were drug related. Contrary to the Actons' assertion, what the teachers and administrators in Vernonia witnessed was not just students "generally act[ing] like juveniles." (Resp. Br. at 2).

The Actons attack the goal of maintaining order in the classroom because, "the government has no less interest in maintaining order and productivity in its workplace than in its schools." (Resp. Br. at 48). Establishing discipline and maintaining order are essential to effective education. Schools are populated by children and

"children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly." *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring). Schools therefore have an interest in maintaining order which surpasses virtually any employer of adults.

While an employer can simply fire disorderly employees, society expects teachers and administrators to do all they can to keep students in school. Suspension and expulsion, while available as a last resort, obviously hinder or terminate education and are frequently considered a sign of failure by the school. Thus, teachers and administrators have the unique and frequently contradictory goals of keeping students in school—even those who are troubled—and maintaining sufficient order to educate.

The Actons criticize the Policy for responding to classroom disorder by testing only athletes. (Resp. Br. at 48). Athletes in Vernonia were widely admired and were among the leaders of those using and glorifying drugs in the schools. (J.A. 20, 37). Juvenile drug use is driven by "peer pressure." (Def. Ex. 106 at 42-43, 45-46). The District therefore had good reason to believe that, in addition to achieving the primary goal of protecting athletes by deterring them from using drugs, the Policy would restore order and discipline by deterring drug use in the student population generally. Moreover, the District was advised by counsel that testing all extracurricular participants could jeopardize the validity of drug testing. (J.A. 30).

VII. DRUG INTOXICATION CANNOT BE RELIABLY DETECTED BY OBSERVATION AND THEREFORE DRUG TESTING IS REQUIRED

The detection of drug intoxication by observation of behavior is wholly unreliable. (J.A. 67-68). "The only standard [for determining drug impairment] is the drug test." (J.A. 67). This Court recognized that fact in *Skinner* and relied upon it to conclude that drug testing

is a reasonable and necessary means of detecting and deterring drug intoxication. 489 U.S. at 628-629. "[S]ince the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary . . . to examine the body or its fluids to accomplish the regulatory purpose." 489 U.S. at 633.

VIII. REASONABLE SUSPICION DOES NOT WORK

The inherent unreliability of detecting drug use by observation makes it uniquely difficult to obtain reasonable suspicion of drug intoxication. Reasonable suspicion requires "sufficient probability." *T.L.O.*, 469 U.S. at 346, *quoting Hill v. California*, 401 U.S. 797, 804 (1971). In the case of drug intoxication, observation simply cannot meet that standard.

Requiring teachers and administrators to develop reasonable suspicion of drug intoxication based on inherently unreliable observation would profoundly undermine drug use detection and deterrence in schools.[6] Some teachers and administrators would inevitably choose to abandon detection efforts altogether, rather than face the minuscule odds that their hunches about intoxication would be correct. Others would have to single out and accuse individual students. That would be far more embarrassing to students, disruptive of the school environment and destructive of the teacher-student relationship than random testing, especially since accusations based on observation will frequently be false. That method of detection would create a far greater "subjective" intrusion on privacy than the Policy. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), *quoting United States v. Ortiz*, 422 U.S. 891, 894-895

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[6] Drug education, of course, should continue, but it is far less effective. As Dr. Dupont explained, "just doing counseling, just doing education [sic] absent some test-based intervention will definitely not work to stop the drug use, or to defer [sic] it as preventative technique." (Def. Ex. 106 at 60).

(1975). "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).

IX. THE POLICY RESULTED IN A MINIMAL PRIVACY INTRUSION

A. Student Athletes' Expectations of Privacy Are Minimal as to Physical Conditions Which Could Endanger Them While Participating in Sports

The Actons admit that students generally "have less expectation[s] of privacy than adults in other settings." (Resp. Br. at 32). The Actons argue, however, that student athletes are not subject to regulations comparable to those governing railroad employees. They characterize the District's athletic regulations as "trifling." (Resp. Br. at 34).[7] But the Actons lose sight of two things. First, they ignore the pervasive regulation inherent in just being a student. "Of necessity, teachers have a degree of . . . authority over their students that is unparalleled except perhaps in the relationship between parent and child." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). When the numerous rules imposed on athletes are considered in addition to the regulation inherent in being a student, it is readily apparent that student athletes are pervasively regulated.

The Actons also lose sight of the reason privacy expectations of those subject to pervasive regulation are minimal: such individuals "reasonably should expect effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672. Schools are uniquely responsible for the

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[7] Regulations requiring a physical exam, adequate insurance coverage or an insurance waiver, a minimum grade point average, school attendance on game days, travel to and from away games with the team and compliance with "any other rules of conduct established by the coach and athletic director, including rules related to dress, training hours and related matters" are hardly "trifling." (R. 61-62; Pl. Ex. 2 at 30).

health and safety of athletes, even more so when on notice of a serious drug problem involving student athletes. The only "effective inquiry" into the existence of drug intoxication is a drug test. Students who want to play sports in a school district with a serious drug problem should not be surprised when urinalysis drug testing is implemented to assure their fitness.

The Actons argue that the District cannot point to anything in its athletic rules that would prepare students for drug testing (Resp. Br. at 34-35). The Policy is part of the student handbook, to which all students have access, and is one of the "athletic rules." (Pl. Ex. 2 at 31). The Policy states clearly who will be tested, under what circumstances and why. (J.A. 7). Advance knowledge of the Policy clearly minimizes a student athlete's subjective expectations of privacy. *See, e.g., United States v. Biswell*, 406 311, 316 (1972) and *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

B. Student Athletes Have a Minimal Expectation of Privacy Because They Volunteered for Sports Knowing that They Must Submit to Drug Testing

The Actons admit that the Policy is less intrusive because it applies only to a voluntary activity. (Resp. Br. at 34-35). But they claim the intrusion "is still extreme" because the voluntary activity is school sports. In several suspicionless search cases finding a lesser expectation of privacy in part because of voluntary choice, the activity to be forfeited to avoid the search was of greater value than the privilege of playing interscholastic sports. *See, e.g., Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656; *New York v. Burger*, 482 U.S. 691 (1987); *Donovan*, 452 U.S. 594; *Biswell*, 406 U.S. 311.

C. The District Was Diligent and Successful in Its Efforts to Minimize the Privacy Intrusion

1. *Observation of student athletes during testing is minimal and is not an affront to reasonable expectations of privacy*

The Actons argue that *visual observation* during drug testing is particularly intrusive. (Resp. Br. at 29-30). There is no visual observation of females. With males, the monitors, when they pay attention,[8] see exactly what those standing in any line to use a public urinal see: the fully clothed back of an individual standing at a urinal. They do not observe the students' genitals or the act of urination itself. (J.A. 28, 42; R. 142). Typically, in both public and public school restrooms, males urinate while others wait in line immediately behind them—much closer than the 12 to 15 feet Vernonia monitors stand away from students. (R. 39-40, 138). Likewise, in public and public school restrooms for women, it is not unusual for others standing outside enclosed stalls to hear the sounds of urination. That is all the female monitors hear in this case.

It is true that those urinating in public restrooms usually are not monitored. But, students being monitored by teachers or coaches should not typically experience the level of embarrassment or intimidation an adult might feel being monitored by an employer. Monitoring is pervasive in most schools. Teachers monitor students in classrooms and halls, while they take tests and even as they dress and shower in locker rooms. One of the monitors testified that he goes through the boys' communal shower rooms "all the time and the kids are in the shower." (J.A. 28). In fact, "anybody walking through [certain doors in the dressing room] can see undress." He also said one toilet stall in that locker room has no door. *Id.*

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[8] One monitor testified that "most of the time" he finds something to work on while samples are being given because visual observation is "not a necessary thing that I have to do." (J.A. 31).

The Actons point to this Court's observation in *Skinner* and *Von Raab* that the privacy intrusion in the adult employment setting is lessened if the sample is given in an independent lab or clinic. But that is not so obvious when, as here, the setting is the familiar environment of the school locker room. Br. of Nat. League of Cities at 23 (citing authorities). Moreover, sending students to a medical facility to provide the sample (a five-minute procedure when performed in the locker room) would be disruptive of classroom education. (J.A. 31).

D. Student Athletes Voluntarily Accept Conditions at Least as Intrusive as the Policy

The Actons claim that children reasonably expect, and are expected, to urinate in seclusion. (Resp. Br. at 27). That simply does not comport with the realities of the public school environment. This Court may judicially notice that the average public school restroom rarely provides "seclusion." There is little seclusion for anyone using either a urinal or toilet in bathrooms in the District's schools.

Students who choose to play interscholastic sports must necessarily overcome any self-consciousness about their bodies. In most public schools across the country, including the District, probing and intrusive pre-season physical exams are required, and urinating, disrobing and showering in communal areas are daily facts of life.

1. *The Policy does not require students to "excrete on demand."*

The Actons assert that athletes are required to "excrete on demand." (Resp. Br. at 26). If they mean that students who wish to play interscholastic sports *must* provide a urine sample, it is true. In that sense, the employees in *Skinner* and *Von Raab* also were required to "excrete on demand." If, however, the Actons mean that some sort of physical or mental intimidation is part of the sample giving process, the record does not support

their assertion. Contrary to the Actons' claim that athletes are routinely taken from class to provide the sample (Resp. Br. at 29), athletes are allowed to provide the sample at a convenient time, whether during class, "at noon, after school, before school [or during] breaks." (J.A. 31). If a student cannot urinate at the time, they "go back to class and come to [the monitor] when they can." (J.A. 32).

2. The Policy is a minimal intrusion on student privacy even though it might detect drug use that does not take place during school

The Actons argue that the Policy is overly intrusive because it amounts to "round-the-clock surveillance" and might detect the student athlete's use of illegal drugs outside of class. (Resp. Br. at 31). The Actons acknowledge that this Court rejected such an argument in *Von Raab* due to the Customs Service's mission which requires "ensuring that [covered employees] do not use drugs off duty." *Id.* Public schools have a similar unique mission: teaching students, inculcating values essential to citizenship, including respect for authority and for the law, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and assuring their safety. Drug use hinders learning by affecting motivation, concentration, understanding and even cognitive thought processes. (J.A. 73; R. 41-42). It also makes playing sports more dangerous. Moreover, drug use outside of school can result in impairment during school or athletic events. For all of these reasons, public schools have a compelling interest in deterring the use of illegal drugs by students at any time.

At the very least, schools should be allowed to prevent athletes from using illegal drugs during a sports season. It would be anomalous indeed if a coach could tell an athlete what to eat, when to go to bed, when and how to exercise, what protective clothing to wear, when to appear for practices and games and what grade point average to maintain, but could not forbid use of illegal drugs during the sports season.

3. There is no evidence that private medical information will be inappropriately gathered or disseminated by the District

While urinalysis *can* reveal private medical facts about a person, urinalysis performed under the Policy does not because it tests only for specified illegal drugs. (Pl. Ex. 5 at 17; Def. Ex. 109). There was no evidence that the District ever tested for legal drugs or to determine other physical facts about athletes. In fact, the consent form authorizes use of the specimen only "to test for drugs and/or alcohol use." (J.A. 10-11; Def. Ex. 109).

The policy requires students to verify use of prescription medications in order to explain positive test results. The testing procedure upheld in *Skinner* likewise required tested employees to disclose medications taken during the preceding 30 days. 489 U.S. at 626, n.7.[9] Because "there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purposes," this Court did not "view this procedure as a significant invasion of privacy." *Id., citing Whalen v. Roe*, 429 U.S. 589, 602 (1977). The same is true here.

4. The Policy is non-punitive

The Actons claim the Policy is punitive because there are sanctions for positive test results. Principal Aultman explained best what the District means by non-punitive:

> We wanted a policy that was not punitive. We're not—we did not want to go out and get kids. These are not bad kids that we're talking about that were on drugs and that were abusing. These are good

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[9] The Actons say it is not clear from *Skinner* that employees were required to indicate *which medications* they were taking. The record in *Skinner* shows that they were. The Field Manual governing the tests required the employee to fill out a form stating what "prescribed or over the counter" medicine he or she had taken as well as the date and time of the last dose. Field Manual, B-15, B-21 *cited generally at*, 489 U.S. at 626, n.7.

kids that were out of control with what was being taken. Our concern is with them too. So we did not want a policy, a policy that was punitive and was kick them out, get them out of here and be done with it, because we would not have had to do this program if we just wanted to expel kids.

So we wanted a prevention program and intervention program built into our drug testing system where there was buy-back, where we could get help if needed. We really wanted to do it from a non-punitive stance.

(J.A. 27-28). The Policy cannot be used to suspend or expel students. The most extreme sanction under the Policy is suspension from interscholastic sports. Students testing positive for drug use suffer no academic or criminal penalty.[10] Moreover, unlike the drug testing programs in *Skinner* and *Von Raab*, the Policy encourages participation in drug assistance programs.

As prestigious as school sports are in Vernonia, the loss of that privilege is far less significant than termination from employment, the sanction imposed in *Von Raab*. 489 U.S. at 663. If the Government can condition employment on refraining from illegal drug use, surely the District can condition participation in sports on the same.

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[10] The Actons note the Policy does not expressly prevent the District from divulging a positive sample result to law enforcement authorities. This Court rejected a comparable argument in *Skinner* because there was no evidence that information had been divulged and no one "seriously contend[ed] that this provision, or any other part of the administrative scheme, was designed as a 'pretext' to enable law enforcement officers to gather evidence of penal law violations." 489 U.S. at 621, n.5 *quoting New York v. Burger*, 482 U.S. at 716-717, n.27. Similarly, the record here does not reveal any intent to divulge test results to law enforcement or that any such disclosure was ever made. The Policy does not provide for such disclosure. The consent form limits release of results to the District and the parents and/or guardians of the student. (J.A. 10-11). The Actons have never claimed that the Policy was pretextual.

The Actons complain that other students might assume that one who is suspended from the sports program is a drug user. Surely schools are not required to abandon drug testing because a student may have trouble keeping his or her illegal drug use a secret.

X. THE POLICY PROVIDED A NECESSARY DETERRENT

The Actons do not refute the significant deterrent effect of drug testing recognized in *Skinner*. 489 U.S. at 630. Instead, they assert that drug testing is an unnecessary deterrent. They claim that the fear of getting caught is a sufficient deterrent. Yet even the threat of termination for drug use "cannot serve as an effective deterrent unless violators know that they are likely to be discovered." *Id.* However, the possibility that drug testing will occur at a time which cannot be predicted with certainty will "significantly increase the deterrent effect" of the Policy. *See, id.*

The desires to play well and to avoid injury also fail to deter drug use. Students using illegal drugs do not recognize that drug use might hurt their performance or lead to injury. They are usually in denial, so "they think they can control it." (Def. Ex. 106 at 60). In fact, drug users feel invincible and are less aware of pain. Instead of *avoiding* drugs to play better, many student athletes *use drugs* in hopes of playing better. (J.A. 84); *See also,* Br. of Nat. League of Cities, *et al.* at 17-19. A far more effective deterrent to drug use by student athletes is the risk of being unable to participate in sports at all. (Def. Ex. 106 at 61-62).

The Actons note that the Policy does not test for alcohol and steroids. The District need not show that the Policy was either the broadest deterrent possible or the least restrictive alternative. The choice between reasonable methods of search is left to the local government involved. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-454 (1989).

The Actons argue that the Policy does not prevent athletes from playing in games while intoxicated by drugs. That is based on the faulty premise that it is only important to deter drug intoxication during games. It is equally important to deter drug intoxication during daily practices.

The Actons criticize the Policy for failing to show whether the level of illegal drugs in an athlete's system would cause "substantial impairment." Given the goal of protecting athletes from drug use through deterrence, it should not matter what level of an illegal drug is in a student's system unless one assumes that some level is acceptable. In any case, "a positive urine test is per se evidence of impairment at the time the test was taken." (Def. Exh. 106 at 55).

XI. THE ACTONS CONCEDE THAT THE POLICY WAS COMPLETELY RANDOM AND VESTED NO DISCRETION IN SCHOOL OFFICIALS

The district court found that the Policy adequately limited discretion and the court of appeals agreed that it "vests no discretion in any district officials." 23 F.3d at 1522 (Pet. App. A at 36a-37a); 796 F. Supp. at 1364 (Pet. App. B at 122a). The Actons do not contest these findings. As in *Von Raab*, these controls on government discretion narrowly and specifically define the permissible limits of the intrusion and thus protect personal privacy as would a warrant. 489 U.S. at 667.

XII. THE POLICY WAS EFFECTIVE

The court of appeals held that the Policy was effective:

> The Policy contributed to reaching the desired goal. Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented.

23 F.3d at 1522 (Pet. App. 34a). Moreover, the athletic director testified that athletic injuries decreased after the Policy was implemented. (J.A. 43).

The Actons find it unlikely that athletes who were taking drugs before the Policy was implemented quit immediately when testing started. (Resp. Br. at 7). Such behavior changes are not at all surprising. Potential loss of the privilege to play sports is a very powerful deterrent. (Def. Ex. 106 at 61-62); *see also* Br. of Nat. League of Cities, *et al.* at 14.

XIII. THE DIFFICULTY OF DETECTING DRUG USE BY OBSERVATION DOES NOT UNDERMINE THE EXISTENCE OF A DRUG PROBLEM IN THE DISTRICT

The Actons argue that if it is difficult to determine by observation whether a *particular person* is under the influence of drugs at a *particular time*, then the District could not conclude it had a serious drug problem involving athletes. It is possible, however, to determine the existence of a general drug problem—based on classroom essays and student conversations boasting of drug use, confessions of use by athletes, arrests of athletes for drug possession, unusual behavior on the playing field and rude, hostile and belligerent behavior in the classroom—without being able to develop a legally sufficient reasonable suspicion that the behavior of a particular adolescent at a particular time is attributable to drug use. For example, this Court noted in *Skinner* that the "railroads were able to detect a relatively small number of Rule G violations, owing, primarily, to their practice of relying on observation by supervisors and co-workers to enforce the rule." Yet "at the same time, industry participants . . . confirmed that alcohol and drug use [did] occur on the railroads with unacceptable frequency." 489 U.S. at 607-608.

XIV. THE DISTRICT'S INTERESTS IN ADDRESSING THE DRUG PROBLEM ARE SUFFICIENT TO ALLOW DRUG TESTING

The Actons distance themselves somewhat from the court of appeals' holding requiring the risk of some dramatic event resulting in immediate physical injury as a

prerequisite to drug testing. 23 F.3d at 1526 (Pet. App. 58a). Instead, they admit that individuals engaged in "less hazardous activities" may qualify for drug testing if there is evidence of frequent drug use within the group and if the potential harm is substantial. (Resp. Br. 44). The District established both of these.

In any case, one thing is certain: schools are in no better position to detect drug intoxication by observation or to deter drug use than the FRA or the Customs Service. Those who have access to drug testing will be able to detect and deter such use. Absent great luck, those who do not have access to drug testing will not. Our nation's schools should have access to the most effective tools available to address student drug use. Otherwise, "an important governmental interest" furthered by drug testing "would be placed in jeopardy by a requirement of individualized suspicion." *Skinner,* 489 U.S. at 624.

CONCLUSION

The District respectfully requests that the judgment of the court of appeals be reversed and the judgment of the district court in favor of the District be reinstated.

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No. 94-590

In The Supreme Court of the United States

October Term, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

v.

WAYNE and JUDY ACTON, guardians ad litem for JAMES ACTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS & RESPONSIBILITIES IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

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35 P.S. §807.1 (1993) 9

Tenn. Code Ann. §49-6-4213 (1994) 9

PERIODICALS AND PUBLICATIONS

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Ellen Flax, *250,000 Teenagers Have Used Steroids, Number May Be Growing, Studies Find*, Education Week, Sept. 19, 1990, at 6 9

OTHER AUTHORITIES

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AMICUS CURIAE BRIEF OF THE AMERICAN ALLIANCE FOR RIGHTS & RESPONSIBILITIES IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

Amicus Curiae files this Brief in support of Petitioner pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The written consents of Petitioner and Respondent have been filed with the Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae American Alliance for Rights & Responsibilities ("AARR") is a national non-profit corporation based in Washington, D.C. AARR's members are individuals dedicated to restoring a sense of responsibility and civic duty in American life. AARR is not affiliated with any political party. Its goal is to re-establish the middle ground in public policy discussions by focusing on the need for balance between rights and responsibilities, rather than the predomination of one over the other.

Substance abuse is one of the primary policy areas upon which AARR currently focuses. For example, it has authored such publications as *The Winnable War: A Community Guide to Eradicating Street Drug Markets* (1991), and has launched the One Church—One Addict program, which gets faith communities involved in assisting those recovering from substance abuse addiction.

AARR works with city officials and community groups to find legal and operational solutions to community problems. In this regard, AARR has been called upon by city officials and community groups throughout the nation to assist them in stemming both the tide of drug use in those communities and the unfortunate problems flowing therefrom.

AARR's active efforts in helping communities to enact and defend constitutional measures aimed at balancing the rights of individuals with the needs of the community will be affected greatly by the Court's decision in this case. As this Court has previously noted, drug use in the schools has become a major social problem. Today, this drug use includes not only the use of illegal drugs such as marijuana and cocaine, but also, in the case of a growing number of student-athletes, the use of painkillers and performance-enhancing drugs. For the public school systems in our country to survive and prosper, school administrators

must have the necessary tools at their disposal to combat this problem. If permitted to stand, the Ninth Circuit's decision in this case will take away one of the most effective tools in combatting drug use among student-athletes—random drug testing. AARR believes that local school administrators must be permitted to adopt and to implement noncriminal, random drug testing programs for student-athletes, so long as the programs contain procedural safeguards such as those present in the instant case.

SUMMARY OF ARGUMENT

In *Acton v. Vernonia School Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994), the United States Court of Appeals for the Ninth Circuit ruled that a school district's random drug testing program for student-athletes was unconstitutional. In so doing, the Ninth Circuit recognized that the school district was faced with a drug problem. Nevertheless, it viewed the student-athletes' privacy rights as tantamount to other important rights and government responsibilities—such as a school district's responsibility to educate its students and to deter drug use among its student-athletes. The Ninth Circuit noted that the presence of "disrespectful, drug-impaired children in our schools is tragic." *Acton*, 23 F.3d at 1526. It erred, however, and applied an incorrect threshold when it concluded that "it is not the type of potential disaster that has caused the Court or us to find a governmental interest compelling enough to permit suspicionless testing." *Id.*

AARR submits that under the precedent of this Court's decisions, the Vernonia School District's random drug testing program is reasonable and, therefore, constitutional. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Accordingly, this Court should reverse the decision of the Ninth Circuit.

Moreover, AARR submits that the drug problem in our schools is nationwide and that the governmental interests in maintaining an atmosphere conducive to education and in deterring drug use by student-athletes are equal or superior to the governmental interest in, for example, ensuring that customs agents are drug-free. In light of the pervasive drug problem in our schools, and in recognition of the effectiveness of random drug testing as a deterrent, AARR submits that as long as they contain the procedural safeguards such as those used in the Vernonia School District program, random drug testing programs for student-athletes should be constitutionally permissible in any school district in America, even in the absence of a specific finding of a drug problem within a particular school or school district. *See Von Raab*, 489 U.S. at 675 n.3.

ARGUMENT

I. The Substantial Interests Of A School District In Maintaining A Safe And Productive Environment For Education And In Deterring Drug Use By Its Student-Athletes Outweigh The Student-Athletes' Limited Privacy Interests And Render Random Drug Testing Constitutionally Permissible.

This Court has held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *T.L.O.*, 469 U.S. at 341. Because the searches at issue in this case are warrantless searches not based on individualized suspicion, the Court now must reach the issue which it expressly reserved in *T.L.O.*—whether there are circumstances, such as those presented in this case, where a school district may institute a random drug testing program (a suspicionless search) in a manner that is "reasonable" within

the meaning of the Fourth Amendment.[1] *See T.L.O.*, 469 U.S. at 342 n.8.

Individualized suspicion is not "an indispensable component of reasonableness in every circumstance." *Von Raab*, 489 U.S. at 665. This Court has recognized exceptions to the requirement of individualized suspicion, especially "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field." ' " *T.L.O.*, 469 U.S. at 342 n.8 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).[2]

Because the type of drug testing policy at issue here is truly random,[3] the Court can focus its inquiry on a balancing of the five "reasonableness" factors this Court has relied upon in determining the constitutionally of similar noncriminal searches: (1) the context in which the search takes place; (2) the societal concerns or governmental interests to be furthered by the search; (3) the effectiveness of the search in furthering those interests; (4) the extent and legitimacy of the expectations of privacy of those to be searched; and (5) the intrusiveness of the search. *See, e.g., Sitz*, 496 U.S. at 451-455; *Skinner*, 489 U.S. at 624-34.

Although the Ninth Circuit in this case recognized the need to utilize such a balancing test, it erroneously held that all other rights and responsibilities must yield to the student-athletes' privacy interests. The court reached this conclusion by improperly tipping its balance through the introduction of a threshold

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[1] It is well established that urinalysis is a search for purposes of Fourth Amendment analysis. *Skinner*, 489 U.S. at 617 (1989).

[2] *See also Michigan State Police v. Sitz*, 496 U.S. 444 (1990) (upholding traffic sobriety checkpoints); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (upholding traffic checkpoints near an international border).

[3] The Ninth Circuit expressly noted that all parties agree that no school official has discretion to pick which individual students will be tested. *Acton*, 23 F.3d at 1522.

requirement that the Vernonia School District establish that "the danger to safety [from drug use in the Vernonia School District] is so high as to be compelling." *Acton*, 23 F.3d at 1527. The Ninth Circuit then set this compelling interest so high that virtually no school district in America could reach it. *Acton*, 23 F.3d at 1526.[4]

The Ninth Circuit justified this "compelling interest" threshold requirement as required by this Court's drug-testing decisions in *Skinner* and *Von Raab*. AARR submits, however, that the Ninth Circuit misread those cases. While the Court clearly found that the government *had* compelling interests to initiate random drug testing in both cases, it did not make a compelling interest a threshold requirement. Rather, this Court required only that the government possess a "legitimate" interest and that a balancing of the reasonableness factors favor testing. *See Skinner*, 489 U.S. at 619. Moreover, because student-athletes possess an even lesser expectation of privacy than did the adult employees at issue in *Skinner* and *Von Raab*, there is no reason whatsoever to hold school districts to a more stringent "compelling interest" test. *See T.L.O.*, 469 U.S. at 340-41; *see also T.L.O.*, 469 U.S. at 348 (Powell, J., concurring) (it is "unnecessary to afford students the same constitutional protections granted adults and juveniles in a nonschool setting.")

AARR submits that the drug testing program in the Vernonia School District clearly passes constitutional muster under the balancing test traditionally applied by this Court, especially in light of the documented drug problem faced by that school district. *See Acton*, 23 F.3d at 1519. This Court can take judicial notice, however, that Vernonia School District is not the

[4]The Ninth Circuit's decision would require a school district to demonstrate that a tragedy proportional to "some shooting, some explosion, some crash of train, truck, or aircraft" had occurred in a particular school district before allowing random drug testing to be instituted. *Acton*, 23 F.3d at 1526.

only school district in America facing a drug problem—the problem is nationwide. *See T.L.O.*, 469 U.S. at 339. While random drug testing is an effective means to identify drug users, it is an equally effective deterrent to drug use. As this Court recently recognized in upholding the constitutionality of random drug testing of custom agents in the absence of a particular drug problem among that group of employees, "preventing an otherwise pervasive societal problem from spreading" is a sufficient government interest to justify random searches. *Von Raab*, 489 U.S. at 675 n.3.[5]

In light of the pervasive drug problem in our schools, and in recognition of the effectiveness of random drug testing as a deterrent, AARR submits that as long as they contain procedural safeguards such as those present in the Vernonia School District program, random drug testing programs for student-athletes should be constitutionally permissible in any school district in America, even in the absence of a specific finding of a drug problem within that particular school district. The analysis of the reasonableness factors below is conducted in the context of this broader proposition.[6]

[5]Moreover, the validity of random drug testing programs should not turn on whether significant numbers of students test positive for drugs. As the Court noted in *Von Raab*, where the government's interest lies in deterring certain conduct, "a low incidence of such conduct, far from impugning the legitimacy of the scheme for implementing this interest, is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 675 n.3.

[6]Although the Ninth Circuit implicitly questioned the wisdom of limiting the drug testing program to student-athletes, AARR believes that student-athletes represent a particularly appropriate group for random testing. As the Seventh Circuit correctly recognized in upholding the constitutionality of a random drug testing program for student-athletes that is virtually identical to the program in the Vernonia School District, student-athletes inherently possess a lesser expectation of privacy than do other students. *Schaill v. Tippecanoe Cty. School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988). *See also infra* at pp. 10-11.

(Continued on next page)

Looking at the first reasonableness factor, the context of the search, the searches at issue are noncriminal searches being conducted in the context of our public schools. This setting provides a uniquely favorable setting for random drug testing. Initially, unlike law enforcement officers who have an adversarial relationship with drug users, school officials have a duty not only to discipline, but also to nurture and to educate, the students for whom they are responsible. *T.L.O.*, 469 U.S. at 336. Furthermore, familiar constraints in both the school and the community provide protection against abuse of students' constitutional rights by school authorities. "[A]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). Further, the "openness of the public school and its supervision by the community afford significant safeguards" against a violation of a student's constitutional rights. *Id.; see also T.L.O.*, 469 U.S. at 349 (Powell, J., concurring). In short and in sum, the fact that it will take place in the context of a school setting favors the constitutionality of a random drug testing program for student-athletes.

Second, the governmental interests at stake here are maintaining a safe and productive environment for educating our children and deterring drug use by our student-athletes. As Justice Powell recognized in his concurrence in *T.L.O.*, "[t]he primary duty of school officials and teachers . . . is the education and

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(Continued)

In fact, athletes at the college, Olympic and professional levels already are subject to highly-publicized, suspicionless drug testing. Moreover, because of the added pressures on student-athletes to perform despite injuries and to use performance-enhancing drugs, these students are particularly susceptible to drug use. Thus, AARR agrees with the Seventh Circuit that student-athletes are a particularly appropriate, discrete group for testing.

training of young people. A State has a *compelling interest* in assuring that the schools meet this responsibility." *T.L.O.*, 469 U.S. at 350 (emphasis added). Justice Blackmun concurred in this regard, "[e]ducation 'is perhaps the most important function' of government . . . and government has a heightened obligation to safeguard students whom it compels to attend school." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)).

The government's interest in deterring the use of drugs among students in general, and student-athletes in particular, is equally compelling. Studies show that the illegal drug use among high school age students is at epidemic levels and expanding.[7] Furthermore, studies indicate that between 250,000 and 500,000 high school age students have used or are using performance enhancing drugs.[8] It is not surprising, therefore, that many states have recognized that their responsibility to educate our children includes a duty to prevent the spread of drug use. *See, e.g.*, Cal. Health & Safety Code §11998.1 (1994); 1994 Conn. Legis. Serv. §221 (West 1994); 14 Del. Code Ann. §3806 (1993); Mo. Rev. Stat. §161.506 (1993); N.Y. Law Educ. §912-a (Consol. 1994); 35 P.S. §807.1 (1993); Tenn. Code Ann. §49-6-4213 (1994). Against this backdrop, AARR submits that the government has a substantial interest, if not a duty, to identify those in our schools with drug problems and to deter the problem from spreading.

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[7] *See, e.g.*, University of Michigan Institute for Social Research, *Monitoring the Future* (press release, Dec. 8, 1994) (tracking, *inter alia*, the expansion of drug use among teenagers from 1991 through 1994).

[8] William E. Buckley, et al., *Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors*, 260 Journal of the American Medical Ass'n, 3441, 3445 (Dec. 16, 1988) (finding that 6.6 percent of 3400 male 12th grade students in 46 public and private high schools surveyed use or have used anabolic steroids); *see also* Ellen Flax, *250,000 Teenagers Have Used Steroids, Number May Be Growing, Students Find*, Education Week, Sept. 19, 1990, at 6.

Third, as to effectiveness of random drug testing of student-athletes, even the Ninth Circuit admitted that such a program is effective in identifying and deterring drug use. *Acton,* 23 F.3d at 1522. Moreover, the best cure for any epidemic is prevention. To anyone who has ever been an adolescent in America, two things are clear. First, peer pressure is a powerful force. Second, the fear of getting caught and/or of suffering severe embarrassment is one of the only forces stronger than peer pressure. Random drug testing gives student-athletes a badly needed tool to empower them with the inner strength they need to say no to drugs and to overpower the formidable opponent of peer pressure. The District Court in this case noted that, "[t]he testimony of Dr. DuPont was particularly persuasive on the significant deterrent effects that a random drug testing program can have on a youthful population." *Acton v. Vernonia School Dist. 47J,* 796 F. Supp. 1354, 1363 (D. Or. 1992).

Fourth, as to the extent and legitimacy of the expectations of privacy of student-athletes, these expectations are, as noted in *T.L.O.*, lesser than those of the general population simply because these individuals are students. Further, this group of students voluntarily subjects itself to extensive regulation, observation and testing. As the Seventh Circuit explained in upholding the random drug testing of student-athletes in *Schaill*, there is an element of "communal undress" inherent in all participation in athletics. Physical examinations, including urine samples for purposes other than drug testing, are common. *Schaill,* 864 F.2d at 1318. Surely, student-athletes have no greater expectation of privacy for the illegal drugs in their urine than they do for the blood-sugar level in that same urine. In addition, given the highly publicized knowledge that college, Olympic, and professional athletes are required to submit to drug testing to ensure fair competition, "it [is] quite implausible that students competing for positions on an interscholastic athletic team would have

strong expectations of privacy with respect to urine tests." *Schaill,* 864 F.2d at 1319.[9]

Finally, as to the intrusiveness of random urinalysis, with proper testing procedures such as those present in the Vernonia School District program, the intrusion into privacy is minimized and entirely reasonable. *Von Raab,* 489 U.S. at 671, 672 n.2. Policies such as the one at issue here minimize the intrusiveness of the search to the greatest degree possible. Students are selected at random, and thus, the testing brings with it no accusation, presumption or shame. The students are not subject to direct scrutiny while producing a specimen. Even though, in the case of the boys, an administrator is in the room, he is 12-15 feet away and the boys turn their backs to the administrator; the circumstances are not unlike those all males face whenever urinating in a public restroom. Similarly, female students provide specimens in closed stalls, without observation. Additionally, the urine specimens are tested only for illegal drugs, not medications. Finally, the results are not used for criminal enforcement purposes; the worst that can happen to any student is suspension from the school's athletic programs for a period of time. In short, the intrusion to the student-athletes' limited expectation of privacy is minimal.

School boards generally are elected by communities; these communities entrust their children's safety and education to these boards and school administrators for several hours each day. These local officials are in a unique position to determine whether a random drug testing program will assist school officials within a given school district in educating its students and

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[9]The Seventh Circuit in *Schaill* examined the "special characteristic" of athletics and made a clear distinction between the testing of athletes and the testing "of band members or the chess team." *Id.* As noted *supra* at p.7 n.6, AARR accepts that distinction in light of the added pressures for student-athletes to use drugs and the reduced expectation of privacy this group of students possesses.

in deterring drug use among student-athletes. Furthermore, school officials can be trusted not to use drug testing programs for illegitimate reasons and can be assumed to have the safety and well-being of the students as their primary concern.

As to student-athletes—who face added pressures to use drugs and possess limited expectations of privacy—the balance of the reasonableness factors clearly tips in favor of permitting a random drug testing program, even if the school district in question has yet to identify a drug problem among its student-athletes. This Court should not deprive local school administrators of this valuable weapon in deterring the spread of the drug abuse epidemic. *A fortiori*, the program in Vernonia School District—where a specific drug problem among student-athletes was identified—should be upheld as constitutional.

II. Even If This Court Were To Apply A Compelling Interest Test, Public School Districts Still Possess A Sufficient Interest To Justify Random Drug Testing Of Student-Athletes.

As noted above, AARR believes that this Court's precedents require only a legitimate, not a compelling, interest—coupled with an appropriate balancing of the reasonableness factors analyzed by this Court in the other suspicionless search cases—in order to justify random drug testing. Even if the Ninth Circuit was correct in applying a compelling interest test, however, random drug testing programs for student-athletes are nevertheless constitutional.

The principal problem with the Ninth Circuit's compelling interest analysis is that it set the compelling interest standard beyond reach. Although admitting that prolific illegal drug use is "a tragedy of national proportions," the Ninth Circuit's decision would require a school district to demonstrate that a tragedy

proportional to "some shooting, some explosion, some crash of train, truck, or aircraft" had occurred in a particular school district before allowing random drug testing to be instituted. *Acton*, 23 F.3d at 1526. Under that analysis, it is doubtful that a single death, or even multiple deaths, in a school district would satisfy the Ninth Circuit's implausible standard. In setting such a test, the Ninth Circuit has ignored both the teaching of this Court's decision in *T.L.O.* and today's reality that drug abuse in our schools is a tragedy on par with those cited by the Ninth Circuit as compelling enough to justify random drug testing. *Von Raab*, 489 U.S. at 674 ("drug abuse is one of the most serious problems confronting our society today").

Without reiterating the above discussion of the governmental interests in conducting random drug testing, (*see supra*, pp. 8-9), school districts' interests in educating our children and in deterring young athletes from drug use clearly are as compelling as the governmental interest recognized by this Court in *Van Raab* as sufficient to justify random drug testing. Thus, even under a compelling interest test, random drug testing of student-athletes—even in the absence of an identified drug problem among the student-athletes in a particular school district—is constitutionally permissible.

CONCLUSION

For all the foregoing reasons, Amicus Curiae American Alliance for Rights & Responsibilities respectfully urges this Court to reverse the decision of the Ninth Circuit in this case and to uphold the constitutionality of random drug testing programs for student-athletes in public schools.

Respectfully submitted,

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether petitioner violates the Fourth Amendment by requiring students who wish to participate in interscholastic sports to agree to take suspicionless urine tests for alcohol and illegal drugs.

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Miscellaneous:

Bureau of Justice Statistics, U.S. Dep't of Justice, *Teenage Victims: A National Crime Study Report* (May 1991) 22
1 Core Institute, Southern Illinois Univ., *Alcohol and Drugs on American College Campuses* (1989-1991) 17-18
S. Greenbaum, *Drugs, Delinquency, and Other Data* (1994) 18
H.R. Rep. No. 425, 103d Cong., 2d Sess. (1994) 18, 21

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1 National Institute on Drug Abuse, *National Survey Results on Drug Use from the Monitoring the Future Study, 1975-1993* (1994) 17, 18
National School Boards Association, *Violence in the Schools: How America's School Boards Are Safeguarding Our Children* (1993) 21
2 Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Juvenile Justice* (Spring/Summer 1994) 18
Office of National Drug Control Policy, Executive Office of the President, *National Drug Control Strategy: Reclaiming Our Communities from Drugs and Violence* (Feb. 1994) 22

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-590

VERNONIA SCHOOL DISTRICT 47J, PETITIONER

v.

WAYNE ACTON AND JUDY ACTON, ETC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a school district may, consistently with the Fourth Amendment, conduct suspicionless drug testing of student athletes. Although education is primarily the responsibility of state and local governments, the federal government has a substantial interest in the question presented here. The federal government provides large amounts of money to support state and local drug-education and drug-prevention programs. Of particular relevance, Congress has authorized federal grants under the Drug-Free Schools and Communities Act of 1986 (1986 Act) to be used for, among other things, "non-discriminatory

random drug testing programs for students voluntarily participating in athletic activities." 20 U.S.C. 3192(d) (Supp. V 1993).[1] In addition, the federal government has a strong interest in preserving flexibility for school districts in designing programs and policies that will enable them to achieve the National Education Goals, one of which is to minimize student drug use and create an environment conducive to learning in the schools. Goals 2000: Educate America Act, Pub. L. No. 103-227, § 102(7), 108 Stat. 132-133 (1994). The United States participated as an amicus curiae in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), which addressed the application of the Fourth Amendment to searches of school students by school officials. Moreover, federal officials were parties to cases in this Court involving Fourth Amendment challenges to drug-testing programs for employees. See *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989).

[1] The Department of Education, which administers the 1986 Act, advises us that more than $390 million was appropriated under the Act for state and local education authorities for fiscal year 1993; the amount appropriated for fiscal year 1994 was more than $274 million. The Department of Education also advises us that petitioner has received yearly grants under the 1986 Act of approximately $7,500. In October, 1994, Congress enacted a reauthorization of the 1986 Act; the new Act takes effect in July, 1995. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3672-3690. Although the new Act does not explicitly authorize the use of federal grants for random drug testing of student athletes, that use continues to be permitted under the new Act. See 108 Stat. 3682-3684.

STATEMENT

1. a. Vernonia, Oregon, is a logging town of about 3000 people located northwest of Portland. Petitioner, Vernonia School District 47J, runs two schools there: Washington Grade School and Vernonia High School. Pet. App. 2a, 77a. Until the early 1980s, discipline was not a major problem at the schools, and illegal drug use was limited to "'fringe' elements" among the students. *Id.* at 79a.

That situation changed between 1985 and 1989. During that period, the schools confronted a "marked increase in disciplinary problems, student drug use, and the glorification of drug culture." Pet. App. 2a. Drug paraphernalia was confiscated from students. *Id.* at 81a. Students smoked marijuana at a coffee shop across the street from the high school. Students boasted about their drug use, telling teachers that there was nothing the school could do about it. *Id.* at 80a-81a; see also Tr. 21, 26. Students formed organizations, such as the "Drug Cartel" and the "Big Elks," that glorified drug use. Pet. App. 4a. There was a threefold increase in classroom disruptions and disciplinary reports. *Id.* at 80a-81a, 86a.

The drug and discipline problems centered around the student athletes. Student athletes made up most of the membership of the "Big Elks," which distinguished itself by bizarre behavior that teachers believed could only be due to drug use. Tr. 129. Several student athletes were caught drinking alcohol in a bus after a game; others were caught stealing alcohol from a store after a track meet. Pet. App. 81a. A student wrestler hurt himself by failing to execute a basic safety maneuver at a wrestling meet. His coach attributed the injury to drug use

because the team had practiced the maneuver repeatedly and because the student's hotel room reeked of marijuana when the coach visited it on the morning after the meet. *Id.* at 81a-82a. The same coach testified that drug use was affecting some student football players by causing them to ignore or forget basic safety routines. *Id.* at 82a; see also Tr. 110-113.

School officials talked to parents and students, who confirmed that the increasing discipline problems were caused by the increasing student drug use. Further investigation showed that the leaders among the student drug users were the student athletes. Pet. App. 83a. That caused particular concern because school athletics "play a dominant role in the community and student athletes are well known and admired." *Id.* at 77a-78a.

School officials considered and tried several measures before adopting the drug-testing program at issue here. They held numerous, ongoing drug-education programs, which had no discernible effect. Pet. App. 84a-85a. On one occasion, they brought a drug-sniffing dog into one of the schools. *Id.* at 85a. They even considered "mass expulsion" of the offending students. *Id.* at 86a-87a.

In 1988, school officials began to consider adopting a drug-testing program. The program at issue here was implemented in the fall of 1989, after it had been endorsed at a meeting of parents and approved by the School Board and the Superintendent. Pet. App. 4a, 87a-88a.

b. Under petitioner's drug-testing program, a student who wishes to participate in interscholastic sports (which are held for grades 7 and above) must sign, and have his parents or guardians sign, a form consenting to the drug testing of the student. Each student athlete is tested for drugs before each sports season. In addition, 10% of the student athletes are tested each week of the

season based on a lottery system. Any student athlete who refuses to be tested may be suspended from the athletic program. Pet. App. 4a-5a, 88a-89a; Tr. 47.

The testing procedure during the season is essentially the same for male and female students at both the grade school and the high school. A student goes into a locker room, where he or she is given a cup and a vial by a teacher or coach of the student's gender. Male students go to a urinal and urinate into the cup, fully clothed and with their backs to the adult monitor; female students go into an enclosed toilet stall to produce their samples. The monitors are close enough to hear the student urinate. The student hands the cup to the monitor, who pours its contents into the vial. The student puts a lid on the vial; the monitor seals the vial with security tape; and they both sign and date the tape. A specimen control number is written on the tape; the vial is put into a plastic bag; and the bag is sealed. The student then completes a control form affirming that the sample is his or hers. Pet. App. 5a-6a, 89a-91a; Tr. 38, 73-75.

The urine samples go to Metrolab, a private laboratory in Portland. Metrolab tests them for alcohol, amphetamines, cocaine, and marijuana, with an accuracy rate of 99.94%. If a sample tests positive, Metrolab tests it again. Metrolab reports positive results to the school by telephone and in writing. Pet. App. 7a, 92a.

The school takes action only if a sample tests positive twice. In that event, the school meets with the student and his or her parents or guardians. At the meeting, the student is given a choice: If the student wishes to stay in the athletic program, he or she must agree to receive drug counselling and be tested every week for six weeks; otherwise, the student is suspended from the athletic program for the rest of that season and the following one.

The student has this choice both the first time and the second time that the student has a confirmed positive drug test. The third time a student tests positive for drugs, however, he or she is suspended from the athletic program for the rest of the season and the next two seasons. Pet. App. 7a-8a, 93a; Tr. 50-53.

Petitioner's written policy states that the drug-testing program "is not punitive." PX 1, at 2. Test results are available only to certain school officials; otherwise, they "remain confidential." Pet. App. 121a. Test results "may only be used to suspend the student from participation in the athletic program—test results are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." *Id.* at 121a-122a.

At the end of the first school year in which the drug-testing program was implemented (1989-1990), the number of disciplinary referrals decreased to 50% of those for the previous year. Tr. 22, 43; see also Pet. App. 34a-36a. School officials attributed the decrease primarily to the drug-testing program. Tr. 44-45, 137; see also Pet. App. 34a.

c. In the fall of 1991, James Acton, a seventh-grader in the Washington Grade School, signed up for the football team. He also took the physical examination that petitioner requires (independently of the drug-testing program challenged here) of all students who wish to participate in interscholastic sports. As part of that exam, he provided a urine sample. Pet. App. 94a & n.2; Tr. 13-14. At the first football practice, he was given the consent form that had to be signed under petitioner's drug-testing program. James and his parents refused to sign it. Because of their refusal, James could not try out for the football team. *Id.* at 9a, 94a-95a; Tr. 7-9, 12-13.

2. James' parents, respondents here, brought this action against petitioner in the United States District Court for the District of Oregon, relying on 42 U.S.C. 1983. They claimed that petitioner's drug-testing program violates the Fourth Amendment of the United States Constitution and Article I, Section 9, of the Oregon Constitution. They sought declaratory and injunctive relief barring the program. Pet. App. 76a. After a bench trial, the district court entered judgment for petitioner, holding that the program comports with the Fourth Amendment and the cognate provision of Oregon's Constitution. *Id.* at 76a-142a.

To decide the Fourth Amendment issue, the district court "engage[d] in a balancing test." Pet. App. 113a-114a. Under that test, the court required petitioner to "demonstrate a 'compelling need' for the program" that outweighed the student's legitimate expectation of privacy. *Id.* at 114a. The court held that petitioner made that showing, based on the following determinations:

(1) drug use was threatening the physical safety of student athletes, *id.* at 115a-116a;

(2) student athletes are role models for other students, including with regard to the use (or non-use) of drugs, *id.* at 116a-117a;

(3) the drug-testing program is aimed at the one activity—participation in interscholastic sports—that causes it to have the greatest deterrent effect, *id.* at 117a;

(4) student athletes have diminished expectations of privacy, compared to other students, because they are required to have physical examinations, and they

have little privacy in the locker room, *id.* at 117a-118a;

(5) the drug-testing program was adopted, not as a "fishing expedition" or a "moral crusade," but instead "for the limited purposes of addressing student safety in athletic programs and, ultimately, maintaining discipline in the classrooms," *id.* at 118a-119a;

(6) "the school district considered and actually tried several alternative methods of dealing with the increase in drug and alcohol related disciplinary problems" before turning to drug testing, *id.* at 119a-120a;

(7) petitioner took "significant steps" to limit the intrusiveness of the testing, in that students are not watched when they give urine samples, the samples are tested only for alcohol and certain illegal drugs, and the test results are highly accurate, confidential, and used only to determine eligibility for interscholastic sports, *id.* at 121a-122a; and

(8) the drug-testing program "limits the degree of discretion that may be exercised by coaches and school administrators," since it provides for testing of all student athletes at the beginning of each season and on a lottery basis during the season, *id.* at 122a.

The district court engaged in a similar analysis to conclude that the drug-testing program satisfies Article I, Section 9, of the Oregon Constitution. Pet. App. 138a-142a.

3. The United States Court of Appeals for the Ninth Circuit reversed, holding that petitioner's drug-testing

program "is invalid under the Fourth Amendment," and, consequently, that "Oregon would find it invalid under Article I, Section 9, of its Constitution." Pet. App. 65a. (The latter holding followed from the first, the court of appeals determined, because Oregon courts would construe the state constitutional provision to provide at least as much protection as does the Fourth Amendment in this case. *Id.* at 18a; see also *id.* at 66a (Reinhardt, J., concurring).)

Before addressing respondents' constitutional challenges, the court of appeals rejected their challenge to the district court's findings of fact (Pet. App. 19a-20a):

> [The record] demonstrates that both the administrators and the faculty beheld instances of drug use and glorification. They also perceived actions of athletes and others that were so far out of the norm that use of drugs was a logical inference. Besides that, they were told of incidents by others who were concerned and who had no reason to lie.

The court of appeals analyzed the constitutionality of the program in light of four factors that it derived from *Delaware* v. *Prouse*, 440 U.S. 648 (1979) (Pet. App. 31a):

> (1) the importance of the governmental interests; (2) the degree of physical and psychological intrusion on the citizen's rights; (3) the amount of discretion the procedure vests in individual officials; and (4) the efficiency of the procedure.

The court determined that the third and fourth factors "weigh in favor of the [program's] constitutionality." *Id.* at 34a. As to the third factor, the court observed that the program "vests no discretion in any District officials." *Id.* at 37a. As to the fourth factor, the court observed that "[e]very teacher who testified had noticed an im-

provement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the [program] was implemented." *Id.* at 34a.

The court of appeals nonetheless determined that the first and second factors were "dispositive" of the drug-testing program's unconstitutionality. Pet. App. 37a. In the court's estimation, the school's goals of protecting student athletes and deterring drug use by all students are "worthy" but do not concern "the type of potential disaster that has caused [this] Court or [the Ninth Circuit] to find a governmental interest compelling enough to permit suspicionless testing." *Id.* at 56a, 58a. The court also found that the privacy interests of students covered by petitioner's program are not "much less robust than the interests of people in general." *Id.* at 53a.

SUMMARY OF ARGUMENT

I. Petitioner's drug-testing program should be reviewed under the same balancing approach that this Court used in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), to review Fourth Amendment challenges to suspicionless drug-testing programs. In *Skinner* and *Von Raab*, the Court upheld suspicionless drug-testing programs by balancing the individual's legitimate privacy interests against the government's interests. The Court found that the particular programs at issue there passed the balancing test because they (1) served "compelling" governmental interests that would be jeopardized if individualized suspicion were required; (2) posed only a limited threat to the legitimate expectations of privacy

of those covered by the programs; and (3) provided safeguards to limit the discretion of the officers administering the programs.

II. When reviewed under the balancing approach of *Skinner* and *Von Raab*, petitioner's drug-testing program satisfies the Fourth Amendment.

First, petitioner's program serves compelling governmental interests: the protection of student athletes from physical injury and the deterrence of drug use by students generally. The State's interest in "the education and training of young people" is "compelling." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring). Petitioner showed that it could not effectively educate its students in the wake of the drug and discipline problems that developed in the mid-1980s without a drug-prevention program that included, as a reasonable component thereof, a program of drug-testing for athletes. Petitioner also showed that its interests could not have been served by drug testing based only upon individualized suspicion.

Second, petitioner's program poses only a limited threat to the legitimate privacy interests of the students covered by it. "[S]tudents within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). Moreover, petitioner showed that the student athletes covered by its program have lesser legitimate expectations of privacy with regard to physical examinations than do students in general.

Finally, petitioner's program leaves little room for discretion by "officials in the field." It provides for all student athletes to be tested at the start of each season and for student athletes to be tested on a lottery basis during the season. That procedure minimizes the risk of

random or arbitrary violations of the Fourth Amendment by individual government officials.

ARGUMENT

PETITIONER'S PROGRAM FOR THE SUSPICIONLESS DRUG TESTING OF STUDENT ATHLETES COMPORTS WITH THE FOURTH AMENDMENT

Petitioner's drug-testing program plainly implicates the Fourth Amendment (as made applicable to the States by the Fourteenth Amendment, see *Mapp* v. *Ohio*, 367 U.S. 643 (1961)). That is because petitioner's program entails "the collection and testing of urine," which "must be deemed searches under the Fourth Amendment." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989). In *Skinner* and *Von Raab*, this Court upheld, against Fourth Amendment challenges, programs for the suspicionless drug testing of certain groups of employees. We show in Part I below that the approach of *Skinner* and *Von Raab* should be used to review respondents' Fourth Amendment challenge to petitioner's program. We show in Part II below that, under that approach, petitioner's program comports with the Fourth Amendment.

I. Petitioner's Drug-Testing Program Should Be Reviewed Under The Balancing Approach of *Skinner* And *Von Raab*

"Except in certain well-defined circumstances," *Skinner*, 489 U.S. at 619, the Fourth Amendment requires a search to "be supported * * * by a warrant issued upon probable cause," *Von Raab*, 489 U.S. at 665. In *Skinner* and *Von Raab*, this Court held that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 489 U.S. at 665-666; see *Skinner*, 489 U.S. at 624. The Court in *Skinner* and *Von Raab* further held that the programs before it were reasonable under a balancing test to the extent that they (1) served compelling governmental interests that would be jeopardized if individualized suspicion were required; (2) posed only a limited threat to the legitimate expectations of privacy of those covered by the programs; and (3) had safeguards to prevent random or arbitrary violations of the Fourth Amendment by government officials. Petitioner's program is reasonable on the same grounds.

The Court in *Skinner* and *Von Raab* proceeded in two stages. First, the Court held that the programs before it did not automatically violate the Fourth Amendment merely because they provided for searches without warrants or probable cause. See *Skinner*, 489 U.S. at 618-624; *Von Raab*, 489 U.S. at 665-668. The Court based that holding on the existence of "special needs, beyond the normal need for law enforcement," that "ma[d]e the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment); *Von Raab*, 489 U.S. at 665-666.

The Court in *Skinner* and *Von Raab* then turned to the question whether the programs before it satisfied the reasonableness requirement of the Fourth Amendment. To decide that question, the Court balanced the governmental interests served by the programs against the legitimate privacy interests of those covered by the programs. In holding that the governmental interests

outweighed the individual interests, the Court made three determinations.

First, the Court in *Skinner* and *Von Raab* determined that the drug-testing programs before it served "compelling" governmental interests that would be jeopardized if searches had to be conducted based only on individualized suspicion. Thus, in *Skinner*, the Court determined that "the Government interest in testing without a showing of individualized suspicion is compelling" with respect to railroad employees involved in train accidents and certain violations of train-operating rules. 489 U.S. at 628; see also *id.* at 609-611, 633. The Court reasoned that those employees "can cause great human loss before any signs of impairment become noticeable." *Id.* at 628. In *Von Raab*, the Court determined that a program for the drug testing of U.S. Customs Service employees who are directly involved in drug interdiction or who carry firearms serves the government's "compelling interests in safeguarding our borders and the public safety." 489 U.S. at 677; see also *id.* at 660-661.

Second, the Court in *Skinner* and *Von Raab* determined that the programs did not unduly interfere with the legitimate privacy expectations of those covered by the programs. The Court recognized that urine tests, which were required by both programs at issue, could raise significant privacy concerns in most contexts. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 671. But the Court held that those concerns were minimized in each case by two factors that have particular relevance to the present case: (1) the program was designed "to reduce the intrusiveness of the collection process," *Skinner*, 489 U.S. at 626; see *Von Raab*, 489 U.S. at 672 n.2; and (2) the covered employees had diminished expectations of privacy compared to the population in general, see *Skinner*, 489 U.S at 627; *Von Raab*, 489 U.S. at 672.

Finally, the Court in *Skinner* and *Von Raab* determined that the standards for testing prescribed by the programs before it minimized the risk of arbitrary enforcement by individual government officials. Thus, in *Skinner*, the Court found it significant that the drug-testing program for railroad employees posed no risk of "random or arbitrary" enforcement by government agents because of "the standardized nature of the tests and the minimal discretion vested in those charged with administering the program." 489 U.S. at 622. Similarly, in *Von Raab*, the Court determined that, because of the criteria for testing specified in the program administered by the U.S. Customs Service, a covered employee "is simply not subject to the discretion of the official in the field." 489 U.S. at 667 (internal quotation marks omitted). See also *New Jersey* v. *T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."'" (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654-655 (1979)).

II. Petitioner's Drug-Testing Program Is Reasonable Under The Balancing Approach of *Skinner* And *Von Raab*

We discussed above the standard that this Court applied in upholding suspicionless drug-testing programs for employees under a balancing of interests in *Skinner* and *Von Raab*. See pp. 12-15, *supra*. A suspicionless drug-testing program for students should not be

subject to a more stringent standard.[2] And because petitioner's program satisfies the standard applied in *Skinner* and *Von Raab*, this case does not provide an occasion for addressing petitioner's contention that a less stringent standard applies to suspicionless drug-testing programs for students. See Pet. 35-37; see also Pet. 38.

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[2] In *New Jersey* v. *T.L.O.*, *supra*, the Court held that "school officials need not obtain a warrant before searching a student who is under their authority," and that such searches do not need to "be based on probable cause to believe that the subject of the search has violated or is violating the law." 469 U.S. at 340, 341. This Court has subsequently made clear that those holdings were based on the existence of "special needs" of the same sort as were found to exist in *Skinner* and *Von Raab*. See *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in the judgment) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."); see also *Skinner*, 489 U.S. at 619 (quoting concurring opinion of Blackmun, J., in *T.L.O.*); *Von Raab*, 489 U.S. at 665-666 (paraphrasing same); *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (quoting same); *New York* v. *Burger*, 482 U.S. 691, 702 (1987) (quoting same); *O'Connor* v. *Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion) (quoting same). Under *T.L.O.*, because petitioner's drug-testing program serves "special needs," it is not per se invalid on the grounds that it permits searches without warrants or probable cause. By the same token, the existence of such "special needs" does not mean that petitioner's program necessarily comports with the Fourth Amendment. It must still be determined whether the program satisfies the Fourth Amendment's reasonableness requirement. That determination should be made under the balancing approach of *Skinner* and *Von Raab*.

A. Petitioner's drug-testing program serves compelling governmental interests that would be jeopardized if individualized suspicion were required

1. "Education 'is perhaps the most important function' of government." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring in the judgment) (quoting *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954)). Consequently, "[a] State has a compelling interest in assuring that the schools" effectively perform that function. *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). Petitioner showed that it could not effectively educate its students unless it undertook suspicionless drug testing as part of a broader drug-prevention program. Petitioner also showed that the interests served by that program would be jeopardized if individualized suspicion were required. Under those circumstances, petitioner demonstrated that its program was supported by compelling governmental interests.

A school cannot effectively educate its students when a significant number of them uses alcohol or illegal drugs on a regular basis, for three reasons. First, the use of drugs and alcohol "significantly impede[s] the learning process" of the individual user. 20 U.S.C. 3172(3); Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3672 ("Findings"; Section 4002(2)).[3] Second, student drug users may cause violence

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[3] See also 1 National Institute on Drug Abuse, *National Survey Results on Drug Use from the Monitoring the Future Study, 1975-1993*, at 64-65 (1994) [hereinafter *National Survey Results*] (discussing differences in rates of drug use between college-bound and non-college-bound students); 1 Core Institute, Southern Illinois Univ., *Alcohol and Drugs on American College Campuses* 24, Table

and lesser disruptions that keep other students from learning. See 108 Stat. 3672-3690 (amending Drug-Free Schools and Communities Act of 1986, 20 U.S.C. 3171 *et seq.*, to authorize federal funding for violence, as well as drug, prevention programs).[4] Third, as more students begin to use drugs, more are tempted to begin using them, because of peer pressure.[5]

Petitioner proved that each of these factors was operative here. Petitioner showed that in the mid-1980s its schools faced a dramatic erosion of student discipline. As the district court found (Pet. App. 80a-81a):

> Outbursts of profane language during class, rude and obscene statements directed at other students, and a general flagrant attitude that there was nothing the school could do about their conduct or their use of drugs or alcohol typified a usual day.

2-11 (1989-1991) (showing inverse relationship between number of drinks of alcohol per week and college students' grade point average).

[4] The House Committee Report on the 1994 legislation explained (H.R. Rep. No. 425, 103d Cong., 2d Sess. 29 (1994)):

> Drugs and violence are related in many ways. Some drugs affect the user in ways that make violence more likely. Some drug users commit violent acts to get money to buy drugs. Violence is common in drug trafficking as a result of disagreements about transactions and because traffickers use violence as a way to gain competitive advantage.

See also S. Greenbaum, *Drugs, Delinquency, and Other Data* in 2 Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Juvenile Justice* 3-4 (Spring/Summer 1994).

[5] See 1 *National Survey Results* 228 ("It is generally acknowledged that much of youthful drug use is initiated through a peer social-learning process.").

The district court also found that the dramatic increase in discipline problems stemmed from an equally dramatic increase in drug and alcohol use by students (*ibid.*):

> All of the teachers who testified at trial expressed how appalled and helpless they felt as students increasingly expressed their attraction to, and vocal defense of, the use of drugs. Students boasted about drug use and regaled one another with stories of the latest "high" or "party." * * * Organizations formed within the student drug culture taking such names as the "Big Elks" or the "Drug Cartel." * * * Drug paraphernalia was confiscated on schools grounds, and open use of drugs was observed at a local cafe across the street from the high school.

The district court further found that, from petitioner's investigation, it "became clear that the leaders of this [drug] activity were also the leading student athletes." *Id.* at 83a. The drug activity was, the district court found, endangering not only the physical safety of student athletes who used drugs but also the welfare of their peers, for whom student athletes served as role models, including with respect to drug use. *Id.* at 83a-84a, 116a-117a.

Respondents' challenge to the district court's findings, which they renew here (Br. in Opp. 4-16), was rejected by the court of appeals (Pet. App. 18a-21a); in any event, it "evinces an unduly narrow view of the context in which [petitioner's] testing program was implemented." *Von Raab*, 489 U.S. at 674. Respondents primarily dispute that there was an "epidemic" of drug use in Vernonia's schools. Br. in Opp. 4-7. "Epidemic" or not, there is no question that drug use in Vernonia's schools was substantial; in addition, petitioner's program

was designed to deter students from taking drugs in the first place as much as it was designed to detect those who were already taking drugs. Cf. *Von Raab*, 489 U.S. at 674 ("The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs."). In light of that purpose and the fact that petitioner's program covers only student athletes, it was sufficient for petitioner to show that a significant portion of the student body was using drugs or alcohol on a regular basis, to the severe detriment of student discipline on a school-wide basis; that student drug use was most acute among the student athletes, whose drug use exposed them to increased risk of physical injury; and that the student athletes served as role models for other students, such that the use of drugs or alcohol by a significant portion of the student athletes reasonably could be expected to encourage drug use by other students.

Moreover, the adoption of the drug-testing program was not a precipitous response to the drug problem. School officials first investigated the problem by talking to parents, teachers, and coaches. They then conducted ongoing drug-education programs. On one occasion they brought a drug-sniffing dog into the school, and they considered mass expulsion. It was only after substantial drug use continued that they considered drug testing. Then, too, they proceeded cautiously and methodically, by investigating drug-testing programs in other schools and obtaining legal advice. Pet. App. 85a-88a. The program that was instituted was a measured response to a demonstrated problem, not a "fishing expedition" or a "moral crusade." *Id.* at 118a.

The Ninth Circuit deemed the goals underlying petitioner's program to be "worthy," but not "compelling." Pet. App. 56a-58a. The court considered the goals less than compelling because it did not believe that the drug problem in Vernonia schools posed a "terrible threat to safety" such as "some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." *Id.* at 58a. That belief, in turn, appeared to be based on the notion that a student who uses drugs hurts only him- or herself.

As discussed above, the record refutes the notion that the harm of substantial drug use in schools is limited to the individual users. Moreover, petitioner's experience in that regard is consistent with the national data. Cf. *Von Raab*, 489 U.S. at 674 (in assessing governmental interest, Court notes that "drug abuse is one of the most serious problems confronting our society today"). In addition to the immediate destructive effects of drug use on the educational process, the Department of Education advises us that there were about 50 homicides in the nation's schools last year. In addition, "[a]bout 3 million thefts and violent crimes occur on or near a school campus each year, nearly 16,000 incidents per school day." H.R. Rep. No. 425, 103d Cong., 2d Sess. 29 (1994). Experts believe that many, if not most, of those incidents are drug-related.[6]

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[6] In 1994, the National School Boards Association reported that, according to its recent survey of 729 school districts and numerous school leaders, 45% of the incidents of violence in the schools during the 1992-1993 school year were drug-related. See *Violence in the Schools: How America's School Boards Are Safeguarding Our Children* 6 (1993). The Bureau of Justice Statistics within the Department of Justice reports that, according to the National Crime Survey, 37% of all violent crimes committed against young

2. Petitioner showed that its drug-prevention program would be jeopardized by requiring individualized suspicion for drug testing, for the same reasons that obtained in *Skinner*.

Here, as in *Skinner*, the evidence showed that it is not always possible to detect the signs of alcohol and drug use. See Pet. App. 120a (crediting testimony that "visual observations (even by professionals) are simply not reliable indicators of whether [a] student may have consumed alcohol or drugs"); cf. *Skinner*, 489 U.S. at 628-629. Thus, like the program at issue in *Skinner*, petitioner's program has a greater deterrent effect than would a program based on individualized suspicion, because it increases the likelihood of detection. Cf. *id.* at 630.

Moreover, petitioner's program, like the program at issue in *Skinner*, "suppl[ies] an effective means of deterring" individuals covered by the program "from using controlled substances or alcohol in the first place." 469 U.S. at 629. The need to deter a person's "first use" of drugs is especially compelling in the case of students. Both the record in this case and studies confirm that a person is particularly vulnerable to the "first use" of drugs and alcohol in his or her middle and high school years. Tr. 43; Office of National Drug Control Policy, Executive Office of the President, *National Drug Control Strategy: Reclaiming Our Communities from Drugs and Violence* 32 (Feb. 1994).

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teenagers occur at school, and about one-third of all victims of violent crime perceived the offender to have been under the influence of drugs or alcohol, or both, at the time of the offense. See *Teenage Victims: A National Crime Survey Report* 5, 8 (May 1991).

B. Petitioner's drug-testing program poses only a limited threat to the legitimate privacy interests of students covered by the program

The legitimate privacy expectations implicated by petitioner's program are no greater than those implicated by the programs upheld in *Skinner* and *Von Raab*.

Like the programs before this Court in *Skinner* and *Von Raab*, petitioner's program has features that "significantly minimize the program's intrusion on privacy interests." *Von Raab*, 489 U.S. at 672 n.2. Testing under petitioner's program is predictable: Students know that, if they decide to participate in interscholastic sports, they will be tested at the beginning of the season and may be tested during the season. Cf. *ibid.*; *Skinner*, 489 U.S. at 609. Moreover, here, as in *Skinner* and *Von Raab*, "[t]here is no direct observation of the act of urination," *Von Raab*, 489 U.S. at 673 n.2; see *Skinner*, 489 U.S at 626. And here, as the Court found in *Von Raab*, "urine samples may be examined only for specified drugs," and the results of the testing are highly accurate. 489 U.S. at 673 n.2. Indeed, the only significant difference between petitioner's program and those in *Skinner* and *Von Raab* is that under petitioner's program test results may not be used for criminal prosecution under any circumstances. Pet. App. 121a-122a; cf. *Skinner*, 489 U.S. at 621 n.5; *Von Raab*, 489 U.S. at 666. That difference, of course, makes petitioner's program less intrusive than those upheld in *Skinner* and *Von Raab*.

The Ninth Circuit erred in holding that the legitimate privacy interests of student athletes are not "much less

robust" than those of the general adult population. Pet. App. 53a. The Court in *T.L.O.* upheld the search of a student by school officials based on a standard lower than probable cause. *T.L.O.* thus establishes that, for Fourth Amendment purposes, "students within the school environment have a lesser expectation of privacy than members of the population generally." 469 U.S. at 348 (Powell, J., concurring); cf. *Schall* v. *Martin*, 467 U.S. 253, 265 (1984).

Moreover, the student athletes covered by petitioner's program have lesser expectations of privacy, with respect to urine tests, than members of the student population generally. Student athletes in Vernonia were required to take urine tests as part of physical examinations that were required independently of the drug-testing program. Pet. App. 94a & n.2; Tr. 13-14. In addition, the locker rooms in which student athletes changed clothes for sports afforded little privacy. Petitioner's program used these same locker rooms for collection of the required urine samples. Tr. 39-43, 75-76, 121-123, 126.

C. Petitioner's drug-testing program has safeguards to prevent random or arbitrary searches by individual officials

The parties and the courts below say that petitioner's program allows "random" drug testing. See, *e.g.*, Pet. i; Pet. App. 1a. The program is not "random," however, in the pejorative sense that this Court has sometimes used that word in Fourth Amendment analysis. On the contrary, the "randomness" of petitioner's program results from its having procedures for drug testing that leave little room for arbitrary searches by individual government officials. The procedures thus prevent the

singling out of any particular student or group of students for drug testing, and they therefore buttress the reasonableness of the program.

The warrant and probable-cause requirements of the Fourth Amendment function as safeguards against "the random or arbitrary acts of government agents." *Skinner*, 489 U.S. at 622; see, *e.g.*, *T.L.O.*, 469 U.S. at 335; *Prouse*, 440 U.S. at 653-655; *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). When neither a warrant nor individualized suspicion is required for a search or seizure, "other safeguards" are required "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'" *Prouse*, 440 U.S. at 655 (quoting *Camara*, 387 U.S. at 532); *T.L.O.*, 469 U.S. at 342 n.8. In the absence of safeguards against abuses of discretion, a program allowing warrantless, suspicionless searches or seizures violates the Fourth Amendment. Compare *Prouse*, 440 U.S. at 655, 661 with *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 454-455 (1990).

Petitioner's program has safeguards against "random or arbitrary" searches by school officials. Every student athlete must be tested at the beginning of every season and is subject to testing during the season on a lottery basis. See p. 4, *supra*. As a result, the program leaves virtually no discretion to the "official in the field." See Pet. App. 37a; cf. *Skinner*, 489 U.S. at 622; *Von Raab*, 489 U.S. at 667.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 94-590

In the

Supreme Court of the United States

October Term, 1994

Vernonia School District 47J,
Petitioner,

v.

Wayne Acton and Judy Acton,
guardians ad litem for James Acton,
Respondents.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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CASES:

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 6

Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990) 32

Cason v. Cook, 810 F.2d 188 (8th Cir. 1987) 8

Clark v. State, 276 App. Div. 10, 93 N.Y.S.2d 283 (1949) 36

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Desilets v. Clearview Bd. of Educ., 627 A.2d 667 (N.J. Super. A.D. 1993) 12

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 6,7

Ingraham v. Wright, 430 U.S. 651 (1979) 5

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In re Frederick B., 237 Calif. Rptr. 338 (Calif. App. 1 Dist. 1987) 8

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Kuehn v. Renton School District No. 403, 103 Wash. 594, 694 P.2d 1078 (1987) 12

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New Jersey v. T.L.O., 469 U.S. 328 (1985) . . . . . *passim*
R.D.L. v. State, 499 So.2d 31 (Fla. App. 2 Dist. 1986) . . 8
Shamberg v. State, 762 P.2d 486 (Alaska App. 1988) 8
Skinner v. Railway Executives Association, 489 U.S. 602 (1989). . . . . *passim*
Stamos v. Spring Branch I.S.D., 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). 30
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 4
Vargo v. Svitchon, 100 Mich. App. 809, 301 N.W.2d 1 (1980). 35
Webb v. McCollough, 828 F.2d 1151 (6th Cir. 1987). 12
Woodring v. Board of Education of Manhasset Union Free School Dist., 79 A.D.2d 1022, 435 N.Y.S.2d 52 (1981). 36

OTHER AUTHORITIES:

Bartlett, L., *The Courts' View of Good Conduct Rules for High School Student Athletes*, 82 Educ. L. Rep. 1087 (West Pub. 1993). 32
Bell, R., Presentation at *Alcohol and Drugs in the Public Schools: A Forum for School Leaders*, National School Boards Association (NSBA) 1987. 18,20
Dupont R., Deposition Testimony in *Acton v. Vernonia School Dist. 47J*, No. 91-1154MA (April 24, 1992) 17,19,21,22
Milburn, S. and Smith, S., *Your Student Athletes Can Help prevent AOD (Alcohol and Other Drugs) Use*, Student Assistance J. (1992). 33
National Collegiate Athletic Association, *Drugs and the Athlete . . . a losing combination* (1988). 21
National Institute of Drug Abuse, *National Survey Results on Drug Use from the Monitoring the Future Study, 1975-1993*, (1994) 18,22
Ohio High School Athletic Association Handbook (1994-95) 24
Virginia High School League, Inc. Handbook (1994-95) 24

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BRIEF *AMICUS CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

INTEREST OF *AMICUS*

The National School Boards Association

(NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

The issues of drugs in the schools and maintaining a safe environment for student athletes are of major concern to school districts throughout the country, as well as to the parents of the students who are entrusted to the care of the districts.

School boards are concerned that decisions such as that of the court below will seriously undermine their ability to enforce school rules in a manner that will effectively

promote the health and safety of student athletes in the least intrusive manner possible.

ISSUE PRESENTED FOR REVIEW

Whether Petitioner's program of random drug testing of middle and high school student athletes is a constitutionally reasonable "search" under the facts and circumstances of this case.

ARGUMENT

I. Introduction.

This Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 328 (1985), supporting the special need of school administrators to conduct searches of students viewed together with its decision in *Skinner v. Railway Executives Association*, 489 U.S. 602 (1989), finding a compelling government interest to conduct suspicionless drug testing of railway employees amply supports the limited drug testing program in this case. *T.L.O.* upheld a school search based on "reasonable suspicion"

without a showing of a compelling interest in safety or other reason. A suspicion of the violation of any school rule sufficiently justified a school search. *Skinner* upheld the random search of employees without individualized suspicion because of the limited expectation of privacy of these employees and the compelling state interest in protecting the public. The essential elements of both cases are present here and, therefore, justify carving out an exception to the Fourth Amendment.

II. The unique relationship between students and school officials warrants allowing drug testing of athletes where necessary to protect the students from a serious and verifiable health and safety risk.

It is well established that students do not "shed their constitutional rights at the schoolhouse door." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). But, as this Court has noted on numerous occasions, both the age of students and the nature of the mission of

schools make the environment of the public school a unique place in which constitutional rights must be viewed in a different light.

Understanding the special context of schools, this Court has recognized in a number of cases that the rights of students in the school are not necessarily coextensive with those of adults. And although public school officials are certainly state actors subject to the restraints of the U.S. Constitution, their special and unique mission calls for different rules. *New Jersey v. T.L.O.* points out that in order to maintain the "informality of the student-teacher relationship," school officials must be afforded flexibility to search students without the necessity of obtaining a search warrant or meeting a probable cause standard. 469 U.S. at 340. Similarly, *Ingraham v. Wright*, 430 U.S. 651 (1979), held that there is little need for the protection of the Eighth Amendment in the schools because "the openness of the public

school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner. . . As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged . . . ." *Id.* at 670. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), the Court stated that it was "perfectly appropriate" to discipline a student for the sexual innuendo in his speech to the student body in order to "make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." The Court also ruled in that case that school rules are not subject to the same scrutiny as a criminal code imposing criminal sanctions. And, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court reiterated the

proposition that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission,' [citing *Fraser*] even though the government could not censor similar speech outside the school." *Id.* at 266.

The question before the Court in this case is whether the nature of the schools and their mission to educate and protect the students in their charge justify extending the *T.L.O.* standard to include searches in circumstances such as are present here, where there is a generalized suspicion that students are using drugs, but no evidence that the particular student searched is guilty of such use. In *T.L.O.* the Court held that the assistant principal's search was based on a reasonable individualized suspicion that the student had violated a school rule. The facts in that case did not necessitate a decision as to whether individualized suspicion is a necessary element of the Fourth Amendment

exception carved out in the case.

In *T.L.O.* the governmental need in conducting the search -- to enforce school rules -- was balanced with the degree of certainty that the individual searched violated those rules -- thus presenting a reasonable individualized suspicion. A number of cases have applied this standard to searches based on such conduct as: students being out of their authorized areas, *In re Bobby B.*, 218 Calif. Rptr. 253 (Cal. App. 2 Dist. 1985), *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987); student seen in the vicinity of a theft, *R.D.L. v. State*, 499 So. 2d 31 (Fla. App. 2 Dist. 1986); students exchanging money and giving evasive responses, *In re Frederick B.*, 237 Calif. Rptr. 338 (Calif. App. 1 Dist. 1987); student with history of problems seen near other students changing money, *In re Robert B.*, 218 Calif. Rptr. 337 (Calif. App. 2 Dist. 1985); student exhibiting signs of intoxication or drug use, *Shamberg v. State*,

762 P.2d 486 (Alaska App. 1988); and student with known past involvement in drug activity displaying unusual bulge in crotch of pants, *Cornfield v. School Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). In all these circumstances, the courts found that the actions of the school officials were justified.

Although the *T.L.O.* standard has usually been applied in cases involving the adequacy of individualized suspicion, the *T.L.O.* Court made clear it was not deciding whether such particularized suspicion is always necessary to justify school searches.

> We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.' [citations omitted.]

New Jersey v. T.L.O., 469 U.S. at 342 n. 8.

In this case both courts below agreed that the school district laid a foundation for its search of student athletes but did not agree on whether that foundation was sufficient to warrant the search in the absence of a suspicion that the particular individuals searched were using drugs. In the court of appeals view, searches conducted in absence of individualized suspicion can only be justified by a "compelling" government interest which it interprets to mean under *Skinner* some catastrophic threat to public safety. It refused to find that safety of athletes was "compelling." *Amicus* believes that the interest in student safety is "compelling." *See* discussion, *infra*, at 15-21. But even if arguably the risk to the public in *Skinner* was more compelling than the risk to student athletes in this case, *amicus* contends that the environment of the schools and the nature of the relationship between student athletes and school officials supports

a holding that a drug testing program is reasonable if it is undertaken to protect student athletes from a known risk.

Courts have in fact upheld suspicionless searches in other extracurricular areas in the absence of individualized suspicion where school officials are acting *in loco parentis*. One area in particular is overnight excursions--an activity which has no counterpart outside the schools. For example, one court upheld the action of school officials supervising a voluntary band trip to Hawaii in conducting a random search of students' hotel rooms based on a general suspicion that students might have alcohol in their rooms. The plaintiff was sent home early and suspended from school after a search revealed that she had violated school rules by having a male in her room and having liquor in the next room. The court deemed it unnecessary to apply the individualized suspicion standard when supervising students

away on school trips where the likelihood of injury or misconduct by students is greater than on school premises. *Webb v. McCollough*, 828 F.2d 1151 (6th Cir. 1987). Similarly, in *Desilets v. Clearview Bd. of Educ.*, 627 A.2d 667 (N.J. Super. A.D. 1993), the court upheld a search of students' hand luggage before a voluntary field trip to a picnic and campground. The court held that "the need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperons. Administrators and teachers have a duty under state laws to protect students from the misbehavior of other students." *Id.* at 672. *Contra, Kuehn v. Renton School District No. 403*, 103 Wash. 594, 694 P.2d 1078 (1987).

III. Protection of students athletes from a known risk posed by drug use is a "compelling state interest" justifying random drug testing. In the circumstances of this case, random drug testing constitutes a "reasonable" search under the Constitution even if the Court believes that the hazards raised by this case do not match those in *Skinner* and *Von Raab*.

A. The Ninth Circuit misapplied this Court's drug testing opinions to the school setting.

The Ninth Circuit cited *T.L.O.* for the proposition that schools are allowed to search on reasonable suspicion and cited *Skinner* and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), for the proposition that testing conducted absent individualized suspicion is reasonable only where there is a "compelling state interest," such as after train accidents. *Amicus* submits that when these three cases are read together, they support the opposite conclusion from the one reached by the Ninth Circuit.

In *Skinner* this Court upheld a drug testing program of railroad employees performed routinely and without individualized suspicion after all serious train accidents. The Court accepted the government's justification for the program based on its showing that drug use in the industry is prevalent and its generalized suspicion that

accidents were caused by the drug impairment of train operators.

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

489 U.S. at 624.

The Court found that the employees had a limited expectation of privacy because of their participation in a highly regulated industry and held that the government had a "compelling" interest in railway safety. In *Von Raab* the "compelling interest" of the government was in ensuring that its front line drug interdiction officers are drug free.

Therefore, outside the context of the schools, the Court has established a standard which allows random drug testing if (1) there is a reduced expectation of privacy and (2) a "compelling" interest which cannot be otherwise met. Both of these elements exist

here.

The Ninth Circuit's failure to acknowledge the presence of these two elements stems from its disregard of the special circumstances extant in the school setting which underlie this Court's decision in *T.L.O.*. Rather than taking account of the need for flexibility recognized in *T.L.O.*, the Ninth Circuit chose a course of judicial rigidity. It requires public school officials to show either a compelling state interest in protecting the general public from some disaster as in *Skinner* or that the officials have a reasonable suspicion that each student searched is guilty of an offense. *Amicus* believes that the Ninth Circuit's decision to equate a sufficient compelling safety interest solely with protection of general public safety is grossly misguided in the context of the public schools.

B. The school district had a compelling interest in protecting student athletes from a serious problem existing both nationally and in the Vernonia School District.

The issue before the Court in this case is not whether drug testing would always be reasonable in the schools, given the obvious drug problem in the country as a whole, but whether there is a reasonable relationship between the intrusiveness of the search and the specific problem sought to be addressed. In 1980 the district did not have a drug problem, and it is likely that a drug testing program designed to deter drug use would not have been reasonable at that time. But at the time the testing program was instituted, a drug problem of crisis proportions existed within the district. In situations where a school has been made aware of real dangers posed to student athletes, parents and the community expect the schools to deal with those dangers.

The school district here responded

appropriately. When school officials noticed a marked increase in discipline problems and positive attitudes among students toward drug use, they instituted drug education programs, which unfortunately proved ineffective. They also noticed that athletic injuries were increasing and suspected some of the increase may have been due to drug use. Based on this reasonable suspicion of drug use by student athletes, but with no effective way to particularize those who were using drugs *before* the occurrence of an injury, the school district decided to institute a random drug testing program in order to deter drug use and to promote the safety of student athletes. In the opinion of Dr. Robert L. DuPont, an expert on substance abuse, without the use of drug testing to determine drug-induced impairment, school teachers and administrators even with special training would still miss more than 90% of impairment caused by drugs and alcohol. R.L. DuPont, M.D., Deposition Testimony in

Acton v. Vernonia School Dist. 47J, No. 91-1154MA (April 24, 1992), at 32. Although an injury might point to a particular athlete using drugs, if the district tested only the injured students that would not be a particularized search any more than was the search in *Skinner*.

In 1989 when the school district instituted the drug testing policy, its concerns about drug use among its students were well founded; drug use among young people remains a serious problem today. According to the most recent study of drug use by secondary students by the University of Michigan for the National Institutes of Health, use of drugs is on the increase by our nation's students. National Institute of Drug Abuse, *National Survey Results on Drug Use from The Monitoring the Future Study, 1975-1993* (1994).

The state's interest in averting substance abuse by young people has special importance. According to Dr. Reed Bell,

former Director of the Office of Substance Abuse Prevention of the U.S. Department of Health and Human Services, the process of chemical dependency in young people is "extraordinarily rapid compared to an adult," so that an adolescent can become "truly addicted" in as little as four to six months. The testimony of drug expert Dr. Dupont noted other special reasons to attempt to deter drug use by adolescents. He noted, ". . .the teenage brain is going through many major changes. . .[A]bstract thinking is being developed. . .[W]hen chemicals come in that interfere with the brain during those teenage years, . . .the brain is very apt to be deflected from its normal development and have very long-term adverse effects from that drug use." DuPont Deposition Testimony, at 23-24. Furthermore, the earlier drug use begins the greater chance of lifetime chemical dependency. Bell pointed to a review of statistical data that suggests that "if we

could defer psycho-active chemical use by young people until they were 21 years of age, we would reduce the chronic addictive population by 50 percent." R. Bell, M.D., Presentation at "Alcohol and Drugs in the Public Schools: A Forum for School Leaders," (National School Boards Association, Washington, D.C., May 18-19, 1987.)

Obviously, the school's interest in deterring drug use by any of its students is a strong one for many well documented educational, social and health reasons. But even putting these reasons aside, the school's interest in deterring drug use by its athletes is even more compelling because of the potential negative effects on playing performance which could lead to serious injury. During interscholastic competition, student athletes who have ingested certain drugs could experience problems such as loss of concentration, slowed reaction time, diminished coordination, increased or

irregular heart and breathing rates, elevated body temperature, increased blood pressure and a false sense of confidence--all of which could impair playing ability and raise the risk of injury. *See* National Collegiate Athletic Association, "Drugs and the Athlete. . . a losing combination," (April 1988). Dr. DuPont noted other effects such as blocked perception of pain, impaired judgment, and difficulty in calculating distance and time relationships which also add to the risk of injury for student athletes training or playing sports under the influence of drugs. DuPont Deposition Testimony, at 41-42.

The school's interest in deterring drug use by its athletes is compelling for another reason besides the avoidance of physical injury to interscholastic sports participants. The recent NIH study in analyzing causation of drug use among young people indicated that peer pressure and student perception of risk are the most important links to drug use.

Interestingly, given the extent of drug education programs in schools, which the study indicated are also important, the study made the observation that the deaths of two athletes -- Len Bias and Don Rogers -- brought home to students the risk of even experimental or occasional use of drugs by individuals regardless of age or physical condition. University of Michigan/NIH Study at 194. *Accord* DuPont Deposition Testimony, at 18. The study also noted that after Lyle Alzado's campaign on the dangers of steroids, the use of steroids by athletes markedly decreased. *Id.* at 206. Commenting upon the effect of drug use by student leaders on the behavior of other students, Dr. DuPont noted:

> [I]t's particularly true in the middle and high school area. . .that the definition of what's desirable, the definition of how you're a winner, is made on the basis of the status of the individual in the peer group. . .[T]he leaders play a very powerful role in terms of shaping the behavior of large numbers of students in the classes. . .[W]hat they do about drugs makes an

> enormous difference about what other kids are going to do who are watching them and making up their minds about what they want to do.

DuPont Deposition Testimony, at 45-46. Thus, it is clear that the behavior of athletes does have a significant effect on drug usage by young people. *See* more discussion on this point, *infra*, at 29-32.

C. Interscholastic athletes have a lesser expectation of privacy than other students because of the extensive health, safety and training rules imposed on athletes.

The Ninth Circuit similarly misapplied this Court's rulings to the school setting to hold that a reduction in the privacy expectation sufficient to justify a random drug test exists only where the government already imposes heavy regulation similar to those applicable to the nuclear energy industry. *Amicus* contends that the concept of reduced privacy interest for student athletes should encompass a more flexible approach.

In many ways student athletes have a

lower expectation of privacy than do other students. In order to be eligible to participate in interscholastic sports, students must meet all the age, enrollment, attendance and scholastic requirements established by the state high school athletic association. *See, e.g.*, Virginia High School League, Inc. Handbook 59-70 (1994-95); Ohio High School Athletic Association Handbook 33-41 (1994-95). Before being allowed to actually engage in any training or competition, student athletes must undergo physical examinations, submit parental consent and insurance release forms and sign a copy of a student athlete policy and agreement. During the course of their athletic activities, they may be given physical therapy, be required to shower in open mass showers, be subjected to an intensive physical exercise regimen and have their physical condition monitored regularly by the school to ensure fitness to play. Student athletes also

submit to conduct rules that restrict their personal habits both in and out of school. *See* more discussion of these restrictions, *infra*, at 29-31. These students may even have to change their diets in order to meet physical requirements for participation.

Requiring athletes to submit to an additional test of their physical condition, in this case a urine test for drugs, is not unreasonable under the circumstances. In addition to ample evidence of a drug use problem in the athletic program, the school district's drug testing plan protects individual athletes' privacy to the greatest extent possible, the testing methodology is reliable and no punitive measures are taken against students who test positive. The school district is testing in order to protect the students, not to punish them.

D. Factors other than the presence of a compelling state interest should affect the determination of the reasonableness of a search in the school setting.

In the instant case the Court must look both at the context of the search and the reasons leading to the search. *T.L.O.* established that a search of a student by a school official is not subject to the same restrictions as a search by a police officer for law enforcement purposes and upheld a search based on "reasonable individualized suspicion" but without inferring that a search would necessarily be unconstitutional if supported by some other reasonable basis. *Skinner* established that, even outside the special context of the schools, a particularly invasive search, such as urine testing, would be "reasonable" if the reason for the search was shown to be "compelling," in that case to prevent train accidents and deter drug use.

All searches arguably are motivated by a desire to either prevent or deter injury or rule infractions. But in determining whether the searches are "reasonable" a number of factors should be considered: (1) who is

conducting the search -- the police, an employer or a school official; the latter has more flexibility than other government officials; (2) who is being searched -- regular citizens, employees, the student body, a special class of students such as athletes or students on an overnight trip; some of these groups of individuals have less expectation of privacy than others. For example, the Court in *Skinner* held that employees in a highly regulated industry have less expectation of privacy; (3) what degree of discretion does the government official conducting the search exercise over who within these groups will be searched; (4) where is the search being conducted -- a home, the desk of an employee, the person; dicta in *T.L.O.* indicates that the more intrusive the search, the more need for judicial scrutiny; (5) why is the search being conducted (what is the object of the search) -- to obtain evidence of a crime, to protect the public from a known

provable risk of harm, or to protect the individual searched from a known provable risk of harm; *Skinner* allowed an intrusive search without individualized suspicion because the reason for the search was so compelling; (6) are there other equally effective means to achieve the government's end that are less intrusive; and (7) are there penalties imposed for refusal to submit to the search or where evidence of wrongdoing is found. The penalties may shed some light on whether the government is motivated by safety concerns or a desire to punish. Various commutations of these factors may produce a variety of judicial results. Such judicial flexibility better reflects the balance between the rights of individual students against the school's interest in promoting a safe academic and athletic environment than the Ninth Circuit's narrow interpretation of this Court's drug testing opinions.

IV. Student athletes stand in a different position in the student body than other students.

A. There is no state or federal constitutional right or legal compulsion to participate in athletics and thus eligibility rules need only be rationally related to a legitimate state interest.

The Ninth Circuit Court of Appeals, based on its findings that participation in school athletics is highly desirable and encouraged by parents and that organized sports are part of the educational process for which tax dollars pay, transformed student participation in athletics from a privilege into a right that students who do not wish to be tested for drugs should not have to forfeit. It should be noted that this judicial elevation in status occurred without citation of any supporting precedents.

In 1986 this Court dismissed for want of a substantial federal question a Texas Supreme Court case holding that students do not possess a constitutionally protected interest in their participation in extracurricular

activities. *Stamos v. Spring Branch I.S.D.*, 695 S.W.2d 556 (Tex. 1985), *appeal dismissed*, 475 U.S. 1001 (1986). That case involved the constitutionality of Texas' "no pass no play" rule requiring students to maintain a certain academic average in order to be eligible for extracurricular activities. The Texas Supreme Court held that the rule was rationally related to the state interest in encouraging minimum levels of academic performance.

Similarly, the drug testing program at issue here is an eligibility requirement that is rationally related to the legitimate state interest in discouraging drug use by students and promoting health and safety of student athletes. This is not an arbitrary requirement based on some generalized notion that athletes should be drug free, without evidence that the eligibility rule would further that interest. Everyone, including both courts below, agrees that there is a drug problem in Vernonia School District with which

the district has attempted to deal through education programs. But that effort has fallen far short, and the district has chosen with good reason to institute a proven technique for deterring and detecting drug use.

Just as students have no constitutionally protected right to participate, they are subject to no legal compulsion to participate. Students participate in athletics voluntarily. If they do not want to be subjected to a reasonable search to determine whether they are drug free, they simply do not have to participate.

B. Athletes are role models for other students and anti-drug rules for athletes serve an important symbolic role for other students.

"Courts have historically allowed school officials a great deal of latitude in the development and enforcement of good conduct rules, insofar as continued eligibility for activities is concerned, because students

engaged in school activities are viewed as school leaders and representatives of the school." L. Bartlett, *The Courts' View of Good Conduct Rules for High School Student Athletes*, 82 Educ. L. Rep. 1087 (West Pub. 1993). Courts have upheld drug and alcohol policies directed toward athletes, accepting the argument of school policy makers that such policies were adopted as a symbol to the community that drugs will not be tolerated and to maintain high standards for athletes in order to instill discipline in other students. *See, e.g., Bush v. Dassel-Cokato Bd. of Educ.*, 745 F. Supp. 562 (D. Minn. 1990).

Some commentators have argued that the courts should not accept statements of school officials without evidence that such policies work. Bartlett, at 1101-03. Here, there is both general and specific evidence that such policies work. The NIH/University of Michigan study indicated that the incidence of drug use by secondary students went down after reports

about the adverse effects of drug use by nationally recognized athletes. *See* discussion, *supra*, at 20-21. It is well recognized that student athletes can also serve as role models to other youth because of the respect they command in the school and the community. Their drug-free performance on the field and positive life style outside the athletic arena serves to reinforce a no-use message among other young people. *See* S. Milburn & S. Smith, "Your Student Athletes Can Help Prevent AOD (Alcohol and Other Drug) Use," *Student Assistance Journal* (Nov./Dec. 1992).

Similarly, the district court noted in this case that Vernonia "is typified by its central interest in school district activities in general and athletics in particular." 796 F.Supp. 1354. Citing expert testimony, the district court found that athletes "are role models for the entire community" and a random drug testing program can have "significant

deterrent effects . . on a youthful population." *Id.* at 1363. And, after implementation of the drug testing program in Vernonia, disciplinary reports returned to "normal" levels, and there were no reports of athletic injuries attributable to drug or alcohol use. *Id.* at 1368.

In *Von Raab*, Justice Scalia disagreed with the "exercise in symbolism" of the majority opinion primarily because of the lack of factual basis for the testing program in that case. However, Justice Scalia joined the *Skinner* decision because of the demonstrated frequency of drug and alcohol use by the targeted class of employees and "the demonstrated connection between such use and grave harm . . ." Certainly, both of these elements are present in the case at bar. In addition, it has been shown here that the testing program has had a positive effect on the rest of the student body because of the unique role played by athletes in the

community.

V. State tort laws require schools to protect student athletes from foreseeable dangers. Where drug use is evident in a school athletic program, drug testing is an effective means of preventing injury.

State tort laws provide remedies for the negligent supervision of interscholastic sports programs. These laws place on districts the duty to be aware of reasonably foreseeable dangers and to take measures to reduce the risk of injury. The duty extends to appropriate instruction of student athletes, supplying and maintaining suitable equipment, properly maintaining grounds and facilities, hiring and maintaining adequately trained coaching and personnel, providing adequate athlete health care, adopting and enforcing safety rules and providing adequate supervision. *See, e.g., Vargo v. Svitchon*, 100 Mich. App. 809, 301 N.W.2d 1 (1980) (no reasonable safety precautions to minimize injuries, failure to supervise coach); *Leahy v. School Board of Hernando County*, 450 So.2d

883 (Fla. App. 1984) (failure to provide enough helmets and mouthguards during contact drills); *Woodring v. Board of Education of Manhasset Union Free School Dist.*, 79 A.D.2d 1022, 435 N.Y.S.2d 52 (1981) (improper installation and maintenance of railing around gymnasium running track); and *Clark v. State*, 276 App.Div. 10, 93 N.Y.S.2d 283 (1949) (failure to provide adequate medical assistance in sports program).

Where the school district is aware of drug use in the athletic program and suspects that injuries have been caused by such drug use, it would seem reasonable for the district to institute a program to reduce that risk. Where drug education has been found to be ineffective, such as in the instant case, drug testing is an appropriate way to protect students.

Schools are expected to deal with potential dangers in athletic equipment, facilities, etc. Is it really so different

for the schools to take steps to prevent injuries from the danger of drugs?

The district court after detailing the enormous scope of the drug problem in Vernonia's athletic program speculated: "I cannot help but wonder what liability defendant might have faced had it failed to take the next step in combatting the drug and alcohol problem when confronted with such clear evidence that students were abusing drugs and alcohol and engaging in sports." 796 F. Supp. at 1364.

Conclusion

The Vernonia School District has clearly established that its random drug testing program for student athletes was a reasonable search under the facts and circumstances of this case. The testing program balanced the privacy interests of student athletes, which are diminished because of the nature of sports and the high degree of regulation of athletic activities to protect the participants, with

the compelling interest of the school in carrying out the public mandate to protect its students. No one factor in this case should be viewed alone; taken in their totality all these elements--the voluntary aspect of athletic participation, the inherent safety risks of athletics, the documented proof that a drug problem existed in the program, the documented proof that athletes are role models and an effective drug abuse program will affect the safety of all the students, the potential for tort liability in absence of protection from known risks--show that the drug testing undertaken in the Vernonia School District is a reasonable search under the Constitution.

Amicus submits that the decision of the Ninth Circuit below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

vs.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a school district condition a student's participation in interscholastic athletics on that student consenting to random drug testing?

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Blackledge v. Allison, 431 U. S. 63, 52 L. Ed. 2d 136,
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Bordenkircher v. Hayes, 434 U. S. 357, 54 L. Ed. 2d 604,
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Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274,
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Brady v. United States, 397 U. S. 742, 25 L. Ed. 2d 747,
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Bumper v. North Carolina, 391 U. S. 543, 20 L. Ed. 2d 797,
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Cafeteria Workers v. McElroy, 367 U. S. 886,
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Camara v. Municipal Court, 387 U. S. 523, 18 L. Ed. 2d 930,
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Cammarano v. United States, 358 U. S. 498, 3 L. Ed. 2d 462,
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Cleburne v. Cleburne Living Center, 473 U. S. 432,
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Connick v. Myers, 461 U. S. 138, 75 L. Ed. 2d 708,
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Cramp v. Board of Public Instruction, 368 U. S. 278,
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Davis v. United States, 328 U. S. 582, 90 L. Ed. 1453,
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Dean Milk Co. v. Madison, 340 U. S. 349, 95 L. Ed. 329,
71 S. Ct. 295 (1951) 24

Donovan v. Dewey, 452 U. S. 594, 69 L. Ed. 2d 262,
101 S. Ct. 2534 (1981) 11

Elfbrandt v. Russell, 384 U. S. 11, 16 L. Ed. 2d 321,
86 S. Ct. 1238 (1966) 20

Ferguson v. Skrupa, 372 U. S. 726, 10 L. Ed. 2d 93,
83 S. Ct. 1028 (1963) 23

Fisher v. United States, 425 U. S. 391, 48 L. Ed. 2d 39,
96 S. Ct. 1569 (1976) 14

Graham v. Richardson, 403 U. S. 365, 29 L. Ed. 2d 534,
91 S. Ct. 1848 (1971) 20

Griffin v. Wisconsin, 483 U. S. 868, 97 L. Ed. 2d 709,
107 S. Ct. 3164 (1987) 3, 14, 17

Hill v. NCAA, 7 Cal. 4th 1, 865 P. 2d 633 (1994) 30

Hooper v. Bernalillo County Assessor, 472 U. S. 612,
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Illinois v. Rodriguez, 497 U. S. 177, 111 L. Ed. 2d 148,
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Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461,
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Katz v. United States, 389 U. S. 347, 19 L. Ed. 2d 576,
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Keyishian v. Board of Regents, 385 U. S. 589,
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Kokkonen v. Guardian Life Ins. Co., 128 L. Ed. 2d 391,
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Lewis v. City of New Orleans, 415 U. S. 130,
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Lochner v. New York, 198 U. S. 45, 49 L. Ed. 937,
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Machibroda v. United States, 368 U. S. 487, 7 L. Ed. 2d 473,
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Maher v. Roe, 432 U. S. 464, 53 L. Ed. 2d 484,
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Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,
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Mansell v. Mansell, 490 U. S. 581, 104 L. Ed. 2d 675,
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Marshall v. Barlow's Inc., 436 U. S. 307, 56 L. Ed. 2d 305,
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McDonald v. Board of Election Comm'rs, 394 U. S. 802,
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New Orleans v. Dukes, 427 U. S. 297, 49 L. Ed. 2d 511,
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New Jersey v. T. L. O., 469 U. S. 325, 83 L. Ed. 2d 720,
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Nollan v. California Coastal Comm'n, 483 U. S. 825,
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People v. Mason, 5 Cal. 3d 759,
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Perry v. Sindermann, 408 U. S. 593, 33 L. Ed. 2d 570,
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Pickering v. Board of Education, 391 U. S. 563,
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Plyler v. Doe, 457 U. S. 202, 72 L. Ed. 2d 786,
102 S. Ct. 2382 (1982) 26

Regan v. Taxation With Representation of Wash., 461 U. S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983) 21, 24

Ruckelshaus v. Monsanto Co., 467 U. S. 986, 81 L. Ed. 2d 815, 104 S. Ct. 2862 (1984) 13, 16, 27

Sable Communications of California, Inc. v. FCC, 492 U. S. 115, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989) 24

Santobello v. New York, 404 U. S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971) 12

Schaill by Kross v. Tippecanoe County School Corp., 864 F. 2d 1309 (CA7 1988) 19, 29, 30

Schneckloth v. Bustamonte, 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) 5, 6, 7, 10, 13, 28

Shapiro v. Thompson, 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1969) 20

Shelton v. Tucker, 364 U. S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960) 20

Sherbert v. Verner, 374 U. S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) 22

Skinner v. Railway Labor Executives' Assn., 489 U. S. 602, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) 24

Speiser v. Randall, 357 U. S. 513, 2 L. Ed. 2d 1460, 78 S. Ct. 1332 (1958) 20

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 15

Terry v. Ohio, 392 U. S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) 5

Torcaso v. Watkins, 367 U. S. 488, 6 L. Ed. 2d 982, 81 S. Ct. 1680 (1961) 20

Treasury Employees v. Von Raab, 489 U. S. 656, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989) 2, 14, 15, 16, 28, 29, 30

United Public Workers v. Mitchell, 330 U. S. 75, 91 L. Ed. 754, 67 S. Ct. 556 (1947) 20

United States v. Biswell, 406 U. S. 311, 32 L. Ed. 2d 87, 92 S. Ct. 1593 (1972) 11

United States v. Broce, 488 U. S. 563, 102 L. Ed. 2d 927, 109 S. Ct. 757 (1989) 27

United States v. Carolene Products Co., 304 U. S. 144, 82 L. Ed. 1234, 58 S. Ct. 778 (1938) 26

United States v. Chicago, M. St. P. & P. R. Co., 282 U. S. 311, 75 L. Ed. 359, 51 S. Ct. 159 (1931) . . 22

United States v. Martinez-Fuerte, 428 U. S. 543, 49 L. Ed. 2d 1116, 96 S. Ct. 3074 (1976) 24

United States v. Matlock, 415 U. S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988 (1974) 5

United States v. Moreland, 258 U. S. 433, 66 L. Ed. 700, 42 S. Ct. 368 (1922) 17

United States v. Raines, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519 (1960) 24

United States v. Robel, 389 U. S. 258, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967) 20

United States v. Salerno, 481 U. S. 739, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987) 24

United States v. Salvucci, 448 U. S. 83, 65 L. Ed. 2d 619, 100 S. Ct. 2547 (1980) 24

United States v. Thriftmart, 429 F. 2d 1006 (CA9 1970) 6, 7

United States v. Watson, 423 U. S. 411, 46 L. Ed. 2d 598, 96 S. Ct. 820 (1976) 5, 6

University of Colorado v. Derdeyn,
863 P. 2d 929 (Colo. 1993) 19, 28

Vale v. Louisiana, 399 U. S. 30, 26 L. Ed. 2d 409,
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Washington v. Chrisman, 455 U. S. 1, 70 L. Ed. 2d 778,
102 S. Ct. 812 (1982) 6

Whitehill v. Elkins, 389 U. S. 54, 19 L. Ed. 2d 228,
88 S. Ct. 184 (1967) 20

Wieman v. Updegraff, 344 U. S. 183, 97 L. Ed. 216,
73 S. Ct. 215 (1952) 20

Williamson v. Lee Optical of Oklahoma, Inc., 348 U. S. 483,
99 L. Ed. 563, 75 S. Ct. 461 (1955) 26

Woodruff v. Parham, 8 Wall. (75 U. S.) 123,
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Wyman v. James, 400 U. S. 309, 27 L. Ed. 2d 408,
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Zap v. United States, 328 U. S. 624, 90 L. Ed. 1477,
66 S. Ct. 1277 (1946) 3, 5, 7, 8, 10, 11, 14, 19, 25

Oregon Constitution

Or. Const. art. I, § 9 2

Treatises

W. LaFave, Search and Seizure (Supp. 1995) 17

R. Rotunda & J. Nowak, Treatise on Constitutional Law
(2d ed. 1992) 27

Miscellaneous

Note, The Fourth Amendment and Housing Inspection,
77 Yale L. J. 521 (1968) 7

Restatement (Second) of Contracts (1981) 9

Sullivan, Unconstitutional Conditions,
102 Harv. L. Rev. 1415 (1989) 22

D. Yergen, The Prize (1992) 11

E. Zemper, Drug Testing in Athletics, in
Drug Testing: Issues & Options 113
(R. Coombs & L. West eds. 1991) 29, 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,

Petitioner,

vs.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit corporation organized to participate in litigation related to public order and criminal justice as it affects the public interest. The decision below needlessly expands the Fourth Amendment and hamstrings the ability of schools to combat drugs. This is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Between 1985 and 1989 teachers and administrators in Petitioner Vernonia School District noticed "a marked increase in disciplinary problems, student drug use, and the glorification of drug culture." *Acton* v. *Vernonia School District 47J*, 23

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1. Both parties have consented to the filing of this brief.

F. 3d 1514, 1516 (CA9 1994). The athletic programs were not exempt from these changes. "Athletic coaches noted an increase in the number and severity of injuries, which they attributed to greater drug use. . . . At one wrestling meet a boy was seriously injured when he failed to perform a basic well-drilled safety maneuver. The student's hotel room smelled of marijuana when the coach later went to check on his condition." *Ibid.*

In response to the rising threat of drugs to athletics, the District adopted a policy conditioning eligibility for interscholastic sports to a student's written consent to drug testing. *Ibid.* The drug testing was done from urine samples provided by the students. *Ibid.* The tests were administered to random students on a weekly basis. *Ibid.* Boys and girls were tested in separate facilities. *Ibid.* While the student gave the sample, a faculty member of the same gender was present to monitor the process. *Id.*, at 1517. The monitor was positioned so that he or she cannot view the student's genitals. *Ibid.*

James Acton and his parents refused to consent to the search, and as a result he was not allowed to participate in interscholastic athletics. James' parents brought an action in federal court attacking the policy as a violation of the Fourth Amendment and its state counterpart, Article I, section 9 of the Oregon Constitution. *Ibid.* The District Court rejected the claim. *Ibid.* The Ninth Circuit reversed, finding a violation of both constitutional provisions. *Id.*, at 1516.

SUMMARY OF ARGUMENT

The search in the present case is justified by consent. Although this Court's most recent cases have involved consents obtained during police-citizen encounters, bargained-for consents, such as the one in the present case, are at least equally valid.

Consents obtained by bargain, where the government gets an individual's consent to search in exchange for some government consideration, are more likely to be voluntary than consents obtained during police-citizen encounters. "Contractual" consents are free from the specter of police authority, are settled at arms length, and are done with the individual's knowledge that

he does not have to submit to the searches. This is simply a higher level of volition than this Court requires for a valid consent to a search.

This Court has upheld such bargained consents. In *Zap* v. *United States*, 328 U. S. 624 (1946), this Court upheld a consent to a search that was obtained as part of a contract with the government. This contractual consent is indistinguishable from the consent in the present case. Both involve a consent to search obtained in exchange for some government consideration. *Zap* is still good law, and governs the search in the present case.

There are other situations in which consent is similarly valid. This Court has found implied consent to some searches when a business enters a field known to be heavily regulated by the government. The knowledge of heavy regulation validates the searches.

The consent in the present case is particularly valid when compared to the plea bargains routinely upheld by this Court. Plea bargains involve a contractual waiver of important trial rights in exchange for a reduced criminal charge. These bargains have been upheld even if the defendant is threatened with the possibility of a significantly greater prison term if he does not agree to the bargain. This far exceeds the relatively minor pressure to consent involved in the present case.

Neither *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989) nor *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987) diminish the validity of bargained consents. Although in theory the searches in both cases could have been upheld as consensual, there were significant factual complications that made upholding the searches under a general reasonableness approach the simpler, and therefore wiser, approach. Thus *Zap* and similar authority remain undiminished.

Nor can dictum in *Perry* v. *Sindermann*, 408 U. S. 593 (1972) invalidate the consent in the present case. *Perry*'s statement that government benefits cannot be conditioned on the waiver of constitutional rights has been limited to the First Amendment. The special conditions that justify *Perry*'s statement with respect to the First Amendment do not exist under the Fourth Amendment. As this is not a First Amendment case, *Perry* does not apply.

Upholding the search condition will not give government unlimited power to bargain away individual rights. Precedent and common sense both support the principle that any conditioning of a government benefit to the waiver of a right must be rationally related to a legitimate government interest. This standard protects individuals from arbitrary government power while allowing individuals and the government to enter into agreements free from judicial interference.

The agreement in the present case satisfies the rational basis test. Drugs pose a particular threat to the safety of interscholastic athletics, whether they are used recreationally or to enhance the athlete's performance. The School District's testing program is more than rationally related to this most important governmental interest of limiting drug use in school sports.

ARGUMENT

I. An individual can give valid consent to a government search in exchange for consideration from the government.

The present case demonstrates the wisdom of the proverb "look before you leap." In the decision below, the Ninth Circuit engaged in a confusing and ultimately incorrect analysis of the Vernonia School District's search requirement under the general reasonableness standard for searches first articulated in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). See *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1521-1527 (1994). Had the Ninth Circuit looked to the issue of consent before leaping into the thicket of *Camara* and its progeny, it would have avoided much confusion and come to the proper conclusion.

Under well-established precedent, validly consented-to searches are reasonable under the Fourth Amendment. Furthermore, the government may obtain this consent from an individual in exchange for some future consideration from the government. As the proposed search in the present case is made pursuant to such consent, it is reasonable. Therefore, there is no reason to

jump into the more complex issues raised by *Camara* and its progeny.[2]

A. Consent and the Fourth Amendment.

Consent is one of the best-established means of upholding the constitutionality of a search. See, *e.g.*, *Illinois* v. *Rodriguez*, 497 U. S. 177, 181 (1990); *United States* v. *Matlock*, 415 U. S. 164, 171 (1974); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 222 (1973); *Katz* v. *United States*, 389 U. S. 347, 358 (1967); *Zap* v. *United States*, 328 U. S. 582, 593-594 (1946). The validity of consensual searches is derived from the purpose behind the Fourth Amendment, protecting a person's "reasonable 'expectation of privacy' " from "unreasonable governmental intrusion." *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968) (quoting *Katz*, *supra*, 389 U. S., at 361 (Harlan, J., concurring)). If a person gives valid consent to a government search, then the intrusion is *per se* reasonable, and the search is lawful.

Recent decisions of this Court focus exclusively on consensual "police" searches.[3] Starting with *Schneckloth* v. *Bustamonte*, *supra*, this Court has explored what kind of consent is necessary for searches made pursuant to police-citizen encounters, how the police may obtain consent, and from whom they may get the consent. See, *e.g.*, *Schneckloth*, *supra*, 412 U. S., at 241 (waiver unnecessary); *United States* v. *Watson*, 423 U. S. 411, 424-425 (1976) (consent cannot be obtained through coercion); *Matlock*, *supra*, 415 U. S., at 177 (third party consent).

This Court has concentrated on these types of consent searches because of the many difficult questions they raise

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2. If this Court determines that consent is not dispositive, then the proposed search is still valid under *Camara*, *supra*, and related cases. As *amicus* expects that Petitioner will address general reasonableness in its brief, *amicus* will refrain from briefing this point.

3. This focus is with regard to searches made pursuant to explicit consent. This Court's implied consent search decisions, however, are centered around "administrative" searches of closely regulated industries. See, *e.g.*, *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 313 (1978). This type of search will be discussed later in this brief. See Part I C, *post*, at 10-11.

regarding the validity of consent. These police searches usually involve an initial contact between officers investigating a crime and a citizen. The encounter then evolves to the citizen consenting to a search by the officers. See, *e.g.*, *Schneckloth*, *supra*, 412 U. S., at 220; *Watson*, *supra*, 423 U. S., at 413; *Washington* v. *Chrisman*, 455 U. S. 1, 3 (1982); *Rodriguez*, *supra*, 497 U. S., at 179-180. The denial of the inevitable suppression motion leaves the appellate courts with the task of reviewing the voluntariness of the consent.

Such encounters create significant legal and factual issues. As the *Schneckloth* Court understood, where consent is the result of such police-citizen encounters, it is important to determine reliably whether the consent is given voluntarily. Thus, while recognizing that without consent searches, "the security of all would be diminished," the *Schneckloth* Court simultaneously understood that in these encounters there was "the possibility of unfair and even brutal police tactics . . . ." 412 U. S., at 225.

The Court dealt with this dilemma by turning to the closest parallel it could find, "those cases in which the Court has had to determine the 'voluntariness' of a defendant's confession." *Id.*, at 223. Under these precedents, there was no "talismanic definition of 'voluntariness,' mechanically applicable to the host of situations where the question has arisen." *Id.*, at 224. Instead, the *Schneckloth* Court determined that voluntariness had to be determined from the necessarily vague "totality of the circumstances." See *id.*, at 226. This is the type of issue that this Court simply must revisit from time to time.

The fact that this Court has recently concentrated on consent searches derived from police encounters does not, however, limit the use of consent to police searches. Non-criminal searches, such as the one in the present case, are at least equally capable of being justified through consent. If anything, consent is more justifiable once the police are removed from the equation.

The non-criminal search made by an administrative official avoids the coercive power behind "the badge and the presence of armed police . . . ." *United States* v. *Thriftmart*, 429 F. 2d 1006, 1009 (CA9 1970). Because the consent is obtained in a relatively neutral setting, there is less reason to be concerned

with a consent to a routine, administrative search. See *id.*, at 1009-1010.

Yet, there are instances where the voluntariness of a consent is even more readily ascertained. Where, as in the present case, consent to a search is obtained in exchange for some government consideration, volition is more certain. The arms-length transaction involved in this type of consent eliminates fact-bound concerns such as the police abusing their authority, see *Schneckloth*, *supra*, 412 U. S., at 229, or the administrative inspector abusing his authority or exploiting the ignorance of the person to be searched. See Note, The Fourth Amendment and Housing Inspection, 77 Yale L. J. 521, 527-529 (1968). The fact that the person is consenting to the search in exchange for some government consideration demonstrates that the individual knows that it is not necessary to submit to the search; if a person does not want to submit to the search, that individual can simply forego the proposed consideration offered by the government. This intentional relinquishment of a known right is a waiver, see *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), a standard of voluntariness that exceeds what this Court requires for consent to a search. *Schneckloth*, *supra*, 412 U. S., at 241.

As the next section will demonstrate, such "contractual" consent is at the genesis of this Court's consent-to-search jurisprudence. The fact that this Court has not ruled on such a consent recently does not diminish the legitimacy of consent obtained through mutual agreement between the government and the person searched. The lack of recent decisions from this Court simply shows how straightforward and valid these consents are.

B. Zap v. United States.

In *Zap* v. *United States*, 328 U. S. 624 (1946), vacated on other grounds, 330 U. S. 800 (1947),[4] one of this Court's first consent to search cases, contractual consent to government

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4. The order vacating *Zap* cited *Ballard* v. *United States*, 329 U. S. 187 (1946). *Zap*, *supra*, 330 U. S., at 800. *Ballard* held that women could not be systematically excluded from federal grand and petit juries. 329 U. S., at 195-196.

searches was recognized as a valid waiver of Fourth Amendment rights. Petitioner Zap, who contracted with the Navy to do experimental work on airplane wings, was convicted of filing a false claim with the government. *Id.*, at 625-626. A key piece of evidence against Petitioner was a check made out to a test pilot that Zap used to defraud expense money from the government. See *id.*, at 628.

Zap's contract with the Navy contained the following consent: " 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' " *Id.*, at 627. Invoking this condition, the government sent two Federal Bureau of Investigation agents to Zap's business posing as Navy auditors. During the audit, the agents discovered the incriminating check. *Ibid.* Zap protested the audit as soon as he found out about it, but the agents continued in spite of his protests. *Ibid.* The check was admitted at trial, and the trial court later denied Zap's motion to strike the check from the evidence as illegally obtained. *Id.*, at 628.

The *Zap* Court upheld the search because of the contractual consent. "[W]hen petitioner, *in order to obtain the Government's business*, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." *Ibid.* (emphasis added). This contractual consent governed the legality of the search. Since the contract allowed inspection by any authorized government agents, the fact that the inspectors worked for the F.B.I. instead of the Navy Department did not detract from the legality of the search. *Id.*, at 628-629. The consent agreement made the search reasonable.

Zap's sanction is equally applicable to the present case. The agreement between the School District and the student is an exchange of enforceable promises. The student agrees to consent to the drug testing in exchange for the District's promise to allow the student to participate in interscholastic sports, subject to other conditions of eligibility. See *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1516-1517 (CA9 1994). This is a contract, "a promise or a set of promises for the breach

of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Restatement (Second) of Contracts § 1 (1981). It is as enforceable as the consent in *Zap*, and there is neither reason nor precedent to invoke the Fourth Amendment to void this agreement.

The fact that there is no "business" interest in the present case should not prevent this Court from upholding the search under *Zap*. For example, in *People* v. *Mason*, 5 Cal. 3d 759, 765, 488 P. 2d 630, 633 (1971), the California Supreme Court invoked *Zap* to uphold probation searches. In *Mason*, defendant's grant of probation included an express condition that defendant submit to searches by his " 'Probation Officer or any law enforcement officer.' " *Id.*, 5 Cal. 3d, at 762, 488 P. 2d, at 631. Mason challenged the admission of evidence seized in a search made pursuant to this consent. "The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us . . . .¶ Similarly, in the instant case, when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had." *Id.*, 5 Cal. 3d, at 765-766, 488 P. 2d, at 633-634 (emphasis in original). What matters is the advance consideration and consent. Money is only one of many legitimate forms of consideration.

Although *Zap* was not mentioned, this Court applied closely analogous reasoning in *Wyman* v. *James*, 400 U. S. 309 (1971). *Wyman* dealt with a New York regulation conditioning receipt of Aid to Families with Dependent Children (AFDC) grants on the recipient's consent to home visits by social workers. See *id.*, at 310-312. The *Wyman* Court upheld this regulation against Fourth Amendment attack, holding that there was no "search . . . in the Fourth Amendment meaning of that term." *Id.*, at 317. Consent helped take the visit out of the Fourth Amendment.

> "We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. *If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely*

ceases, as the case may be. There is no entry of the home and there is no search." *Id.*, at 317-318 (emphasis added).

There is no meaningful difference between *Wyman* and *Zap*.[5] In both cases, the government conditioned an important fiscal reward on the recipient's consent to government intrusion. Whether labeled a consent search or no search at all, in both cases consent obtained in exchange for government consideration made the intrusion legal.

Time has not diminished *Zap*'s value as precedent. It has been frequently and approvingly cited by this Court with regard to consent to search. See, *e.g.*, *Katz* v. *United States*, 389 U. S. 347, 358, n. 22 (1967); *Vale* v. *Louisiana*, 399 U. S. 30, 35 (1970); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1983). This Court has not directed a hint of criticism at *Zap*, and there is no reason to do so now.

C. Implied Consent.

Zap v. *United States*, 328 U. S. 624 (1946) is not the only example of this Court accepting advance consent to searches. This Court has also implied similar consent to searches under certain situations. In *Davis* v. *United States*, 328 U. S. 582, 585 (1946), federal agents discovered that defendant was running a gasoline black market. After arresting defendant, they proceeded to search the station, obtaining some consent from defendant to open various receptacles in the station. See *id.*, at 585-587. The arrest and search were made without a warrant. *Id.*, at 585.

The search was upheld because it was consensual. Since the ration stamps were "*public* documents" the government had a right to demand to see them. *Id.*, at 593 (emphasis in original). This right to inspect lowered defendant's expectation of privacy, making defendant's consent to inspect the coupons voluntary. See *id.*, at 593-594.

5. *Wyman* also promulgated an alternative holding that even if the consent were not voluntary, the search would still be reasonable. *Id.*, at 318. This does not supplant the consent holding, but is instead based on a hypothetical assumption that the consent was invalid. See *ibid.*

Just as Davis' participation in the gasoline market in wartime reduced his expectation of privacy in the ration stamps,[6] this Court has recognized that participation in certain businesses well known to be heavily regulated can create an implied consent to some warrantless regulatory searches. Thus, when a gun dealer "chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). Therefore, warrantless regulatory searches made under this well-known authority are reasonable. See *id.*, at 317. As this Court subsequently noted, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz* v. *United States*, 389 U. S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has *voluntarily chosen to subject himself to a full arsenal of government regulation*." *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 313 (1978) (emphasis added).

It is the advance notice inherent in these schemes that helps make them reasonable under the Fourth Amendment. What underlies these cases is the fact that "the owner of commercial property *cannot help but be aware* that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan* v. *Dewey*, 452 U. S. 594, 600 (1981) (emphasis added). If these entrepreneurs did not want to submit to such searches, they could simply stay out of those closely-regulated fields. Where, as in the present case, the notice is as clear, and the consent is direct, the search is even more reasonable.

D. Agreements and the Bill of Rights.

Zap v. *United States*, 328 U. S. 624 (1946) is not the only example of waiving constitutional rights by mutual agreement between an individual and the government. The plea bargain, when defendant exchanges a plea of guilty for a reduction of the

6. Davis committed his crime during World War II, 328 U. S., at 583, when war needs required heavy government regulation of the gasoline market. See D. Yergen, The Prize 377-381 (1992).

charge by the prosecution, is an "important [component] of this country's criminal justice system." *Blackledge* v. *Allison*, 431 U. S. 63, 73 (1977). It involves a particularly important set of interests: the criminal defendant's trial rights and the prosecution's essential function of charging crimes. The importance of these interests initially raised grave concerns with the courts over the voluntariness of bargained guilty pleas. Cf. *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962) ("A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void").

Over time, this Court came to recognize that even agreements of this gravity were voluntary. Since both the prosecution and defense have something to gain from the plea bargain, "[i]t is this *mutuality of advantage*" that explains the prevalence and acceptability of these agreements to waive rights. See *Brady* v. *United States*, 397 U. S. 742, 752 (1970) (emphasis added). This mutual advantage meant that a plea motivated by a risk of a higher sentence if the case went to trial was still voluntary. *Id.*, at 751.

Like the consent in *Zap* and the present case, the plea bargain is contractual in nature. As noted in *Brady*, it is an agreement grounded in mutual advantage. Furthermore, the promises are enforceable against each side. If the defendant does not plead guilty, then he will go to trial on the higher charges. If the prosecution breaks the bargain, then the court will give redress to the defendant. See *Santobello* v. *New York*, 404 U. S. 257, 262 (1971). "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the *breach of agreement* was inadvertent does not lessen its impact." *Ibid.* (emphasis added). If parties could not contract with the government with regard to constitutional rights, then plea bargains simply could not stand. Their continued existence is testimony to the strength of these types of consents first sanctioned in *Zap*.

Any argument based on the fear that the government may use its power to improperly contract away the Bill of Rights must contend with the fact of plea bargaining. Even though the government may obtain a guilty plea because of the threat of prosecution on a higher charge, the plea is still voluntary.

> "Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial." *Bordenkircher* v. *Hayes*, 434 U. S. 357, 363 (1978).

Since this type of decision meets the voluntary and intelligent waiver standard required for guilty pleas, see *Boykin* v. *Alabama*, 395 U. S. 238, 242-243 (1969), similar agreements would also meet the lower voluntariness standard of Fourth Amendment consent. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 248-249 (1973).

Mutually beneficial consents are found elsewhere in this Court's constitutional precedents. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), federal law required pesticide developers to include trade secrets among the data they submitted to the EPA to allow the agency to determine whether the pesticide was safe enough to market. *Id.*, at 995-996. This information could be used by the EPA to evaluate other companies' pesticides. *Id.*, at 1006. Consent made certain that prospective application of this scheme did not constitute a taking under the Fifth Amendment.

> "Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, *a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.*" *Id.*, at 1007 (emphasis added).[7]

In *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), this Court determined the necessary consent to search by analogizing to the self-incrimination provision of the Fifth Amendment. See *id.*, at 224-225. "The Court has held repeatedly that the Fifth

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7. When the pesticide developers had reason to believe that the trade secrets they submitted would be kept secret, use of this information to benefit others would constitute a taking. See *id.*, at 1011.

Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." *Fisher* v. *United States*, 425 U. S. 391, 397 (1976). If guilty pleas satisfy the compulsion standard, there is no reason for the much less coercive consent requested in the present case.

The consent requested in the present case is even more clearly voluntary than guilty pleas that are routinely accepted in American courts. The threat of withholding participation in athletic programs, while significant, is just not as persuasive as the raw state power invoked to obtain plea bargains. In *Bordenkircher* the prosecution threatened to charge defendant with a crime carrying a life sentence if he did not " 'save the court the inconvenience and necessity of a trial' " and plead guilty to a crime carrying a sentence of 2 to 10 years. 434 U. S., at 358. When defendant refused to accept the bargain, the prosecutor carried out his threat, and defendant was convicted and received a life sentence. *Id.*, at 359. This Court upheld the sentence, allowing prosecutors to present defendants with such "unpleasant alternatives . . . ." *Id.*, at 365.

The threat upheld in *Bordenkircher* is simply a much greater inducement to waive one's rights than the specter of not making the football team. Interscholastic sports are at best of secondary importance to the school system. Education, not competitive sports, is what schools are about. The bargain struck between students and Vernonia School District is mutually beneficial and rational. See Part IV B, *post*, at 28-30. There is no reason for the courts to interfere with it.

II. Neither *Treasury Employees* v. *Von Raab* nor *Griffin* v. *Wisconsin* diminish the precedential value of *Zap* v. *United States*.

In two relatively recent decisions, *Treasury Employees* v. *Von Raab*, 489 U. S. 656 (1989) and *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987), a bargained-for consent to search may have existed, but was not invoked to uphold the searches. In each case, this Court used the general reasonableness analysis first developed in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). The fact that *Zap* v. *United States*, 328 U. S. 624 (1946),

Wyman v. *James*, 400 U. S. 309 (1971), or other consent cases did not govern the searches does not diminish their value as precedent. In *Treasury Employees* and *Griffin*, this Court took the simpler and more extensively argued path to upholding the searches. It did not intend to diminish *Zap* or similar authority.

Treasury Employees involved regulations requiring employees of the Customs Service seeking transfer or promotion to certain sensitive positions to submit to a drug test. See 489 U. S., at 660-662. Any employee who tested positive and offered no satisfactory explanation was subject to dismissal. *Id.*, at 663. Applying *Camara* and its progeny, see *id.*, at 667, the *Treasury Employees* Court found most of the search policy to be reasonable under the Fourth Amendment. See *id.*, at 678-679.

Because the employees only had to submit to the search in exchange for eligibility for promotion or transfer, consent was theoretically available to justify the search. The facts of *Treasury Employees*, however, made the issue of consent complex and difficult. The inherent problems with consent in *Treasury Employees* made general reasonableness the easier and therefore logical path to take.

Most of the employees who were subject to the search condition entered the Customs Service before the search policy was in place. When these career employees joined the Customs Service they had no reason to believe that subsequent promotion or transfer would be conditioned on submitting to drug tests; they never had the opportunity to consent until after they had started a career with the Customs Service. The *ex post facto* nature of the search condition makes the issue of consent significantly more complicated.

If this Court had found that consent was only valid for new employees, the *Treasury Employees* decision would have created two classes of employees: "veterans" who were not subject to the search condition and new employees whose career paths would require them to submit to the searches. By upholding the searches under a general reasonableness analysis, the *Treasury Employees* Court avoided unnecessary complication. This follows the Court's practice of disposing of claims on the simplest grounds available. Cf. *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984) ("If it is easier to dispose of an ineffec-

tiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed").[8]

This explains *Treasury Employees*' single, tangential reference to consent: "Indeed, these procedures significantly minimize the program's intrusion on privacy interests. Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions." 489 U. S., at 672, n. 2. This footnote makes no mention of *Zap* and only refers to the portion of *Wyman* not relying on consent. See *ibid*. Such bare reference does not diminish the importance of consent, but instead reflects the decision of the *Treasury Employees* Court to take the simpler path available through *Camara* and its progeny.[9]

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8. The *Treasury Employees* Court did not dispose of all claims. One class of positions subject to testing was where the employee was likely to get access to classified information. *Treasury Employees*, *supra*, 489 U. S., at 677. The Court remanded the case back to the Fifth Circuit to determine whether all of the positions placed in this category actually were "likely to gain access to sensitive information." *Id.*, at 678. Even if this Court had adopted a consent analysis, this remand would still be necessary. Conditioning a benefit on the waiver of a right must at least be rationally related to a legitimate government purpose. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1007 (1984). A condition that cannot satisfy the purpose it is supposed to advance does not satisfy the rational basis test. See *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 837 (1987). Thus a search condition for a position that in fact did not have any access to classified information would not satisfy the test. Therefore, regardless of the path chosen to affirm the searches, a limited remand was inevitable.

9. This does not mean that *Camara*'s reasonableness standard is necessarily easier to determine than consent. In the present case, students who try out for interscholastic athletics do not have the settled expectations that were present in *Treasury Employees*. Once this complication is removed, consent becomes considerably less difficult, requiring only some express consent in exchange for government consideration and that the bargain be rationally related to a legitimate government interest. See Part IV A, *post*, at 25-28. Satisfying this standard is likely to be much more straightforward than the balancing of interests required by *Camara*. See *Camara*, *supra*, 387 U. S., at 536-537.

If this Court wishes to weaken or abrogate one of its decisions, it usually will do so expressly. Implicit overruling of an unmentioned opinion is both rare and difficult. If a decision is in unquestioned conflict with an older case, then the older case is overruled, even if it is not mentioned in the later decision. See *Asher* v. *Texas*, 128 U. S. 129, 132 (1888). *Treasury Employees* is not in conflict with *Zap* or other consent cases, but instead simply chose an alternative path to uphold the regulations. If a decision is not mentioned in a later case, the natural inclination is to presume that the later did not overrule the earlier decision. "[A] case is not overruled by an omission to mention it." *United States* v. *Moreland*, 258 U. S. 433, 436 (1922).

Similar reasoning keeps *Griffin* v. *Wisconsin*, *supra*, from diminishing the consent cases. Griffin had been convicted and placed on probation in September of 1980. *Griffin*, *supra*, 487 U. S., at 870. One year later, the Wisconsin Department of Health Services promulgated a regulation allowing warrantless searches of a probationer's home so long as there were " 'reasonable grounds' to believe the presence of contraband . . . ." *Id.*, at 870-871. This Court, choosing not to "embrace a new principle of law," upheld a search made pursuant to this regulation as a reasonable regulatory search. *Id.*, at 872-873.

Some jurisdictions have upheld searches pursuant to probation conditions as consensual searches that are valid under *Zap*. See, *e.g.*, *People* v. *Mason*, 5 Cal. 3d 759, 765-766, 488 P. 2d 630, 633 (1971). The fact that this Court did not rely upon consent to uphold the search in *Griffin*, does not, contrary to the assertions of some commentators, undermine these probation search cases or *Zap*. Cf. 4 W. LaFave, Search and Seizure § 10.10, at 24, n. 42.1 (Supp. 1995). *Griffin* involves a retroactively imposed regulation. Since Griffin was already on probation when the search regulation was promulgated, he had no real opportunity to consent to the search. By contrast, the probation condition upheld in *Mason* was a specific part of defendant's grant of probation. *Mason*, *supra*, 5 Cal. 3d, at 762, 488 P. 2d, at 631. Indeed, Mason even knew he was subject to the search condition. *Ibid*. "The *Zap* case is controlling here, for it upheld the validity of an *advance* waiver of Fourth Amendment rights akin to the provisions of the probation condition before us . . . ." *Id.*, 5 Cal. 3d, at 765, 488 P. 2d, at 633 (emphasis in original).

Consent is irrelevant when there was no opportunity to give it, as was the case in *Griffin*.

It is no surprise that the *Griffin* Court does not discuss consent. The lack of actual consent was simply a given. The unimportance of consent to *Griffin* is also demonstrated by the parties' treatment of the issue. The only mention of consent was petitioner's bare assertion that the search was not consented to. See Brief for Petitioner in *Griffin* v. *Wisconsin*, O. T. 1986, No. 86-5324, pp. 11-13. Neither *Zap* nor consent was used by respondent or the United States to justify the search. See Brief for Respondent in *Griffin* v. *Wisconsin*, O. T. 1986, No. 86-5324, pp. iv-vi, 9-11; Brief for the United States as *Amicus Curiae* in *Griffin* v. *Wisconsin*, O. T. 1986, 86-5324, at pp. iii-v, 5-7. "We take it to be a sound principle, that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." *Woodruff* v. *Parham*, 8 Wall. 123, 138 (1869). *Zap*, and the form of consent it addresses, was not in this Court's mind in either *Treasury Employees* or *Griffin*. It remains valid to this day.

III. The *Perry* v. *Sindermann* line of cases cannot be invoked to abrogate consent searches.

In *Perry* v. *Sindermann*, 408 U. S. 593 (1972), this Court formulated a dictum that should not be allowed to govern the present case. The *Perry* Court was confronted with a claim by a nontenured junior college teacher that his contract was not renewed because he publicly criticized his superiors. This failure to renew was claimed to violate his First Amendment rights. *Id.*, at 595. The District Court held that his lack of tenure was dispositive and granted summary judgment for the junior college. *Id.*, at 595-596. The Court of Appeals reversed the District Court, *ibid.*, and this Court affirmed.

In holding that Sindermann's lack of tenure did not bar his First Amendment claim, the *Perry* Court made the following pronouncement:

> "For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.*, at 597.

To the extent that it goes beyond the First Amendment, this statement is dictum. *Perry* was a First Amendment case—whether the government benefits doctrine applied beyond the First Amendment was not an issue. Unfortunately, this dictum has been improperly expanded and invoked by some authorities to dispense with consent as a ground for authorizing searches like the one in the present case. See *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1312-1313 (CA7 1988); *University of Colorado* v. *Derdeyn*, 863 P. 2d 929, 947 (Colo. 1993). These cases fail to recognize that *Perry* and related cases are limited to the withdrawal of governmental benefits in order to punish the exercise of *First Amendment* rights. As the present case does not involve an attempt by the government to purchase an individual's First Amendment rights, *Perry* and its ilk do not apply.

Any indication from *Perry* that the government may not condition the receipt of a government benefit upon the waiver of *any* government right is contrary to this Court's precedents. Plea bargains involve the conditioning of a very important government favor, reducing charges, in exchange for waiving a variety of trial rights. See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978); *ante*, at 12. Similarly, in *Zap* v. *United States*, 328 U. S. 624, 628 (1946), this Court upheld the government conditioning doing business with it on a contractor's waiver of Fourth Amendment rights. See Part I B, *ante*, at 7-10. Neither *Perry* nor any other of this Court's decisions have invalidated such consents under the *Perry* dictum. Unless this Court is in the business of making major revisions of constitutional doctrine on the sly, there must be some limit to the *Perry* dictum. "It is to the holdings of our cases, rather than their dicta, that we must attend . . . ." *Kokkonen* v. *Guardian Life Ins. Co.*, 128 L. Ed. 2d 391, 397, 114 S. Ct. 1673, 1676 (1994).

The limit of this dictum is shown in *Perry*. *Perry* was a First Amendment case dealing with an alleged denial of employment because of the employee's exercise of his free speech rights. As

the *Perry* Court recognized, the First Amendment was at the heart of the denial of government benefits doctrine. Thus, the *Perry* doctrine was "especially" concerned with protecting the employee's "interest in freedom of speech." *Perry*, *supra*, 408 U. S., at 597.

The First Amendment limits of *Perry* are further reinforced by the authorities it cites. It noted that denying benefits because of the exercise of First Amendment rights "would allow the government to 'produce a result which [it] could not command directly.' " *Ibid.* (citing *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958)). The *Perry* Court then noted that "[w]e have applied this general principle" to the denial of various monetary benefits, citing numerous cases. See 408 U. S., at 597.

None of the authorities cited by *Perry* involved denying a government benefit for the exercise of a right outside the First Amendment. Several cases cited by *Perry* did not involve conditioning benefits, but instead involved unconditional actions that were themselves unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 627 (1969) (one-year residence requirement for welfare payments violates equal protection); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971) (denial of welfare to aliens violates equal protection); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 887-889, 899 (1961) (denial of cook's access to military installation did not violate due process); *Speiser*, *supra*, 357 U. S., at 529 (improper placement of burden of proof of loyalty necessary for tax exemption violated due process). The remaining cases cited by *Perry* involved First Amendment rights. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100 (1947) (speech); *Wieman* v. *Updegraff*, 344 U. S. 183, 191 (1952) (association); *Shelton* v. *Tucker*, 364 U. S. 479, 490 (1960) (association); *Torcaso* v. *Watkins*, 367 U. S. 488, 494-496 (1961) (Establishment Clause); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 287-288 (1961) (speech); *Baggett* v. *Bullitt*, 377 U. S. 360, 372 (1964) (speech); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966) (association); *Keyishian* v. *Board of Regents*, 385 U. S. 589, 609 (1967) (association); *Whitehill* v. *Elkins*, 389 U. S. 54, 59-62 (1967) (First Amendment generally); *United States* v. *Robel*, 389 U. S. 258, 267-268 (1967) (same); *Pickering* v. *Board of Education*, 391 U. S. 563, 574-575 (1968) (speech). See *Perry*, *supra*, 408 U. S., at 597.

Perry had no support to extend its reach beyond the First Amendment.

Other decisions reinforce the First Amendment limits on *Perry*. Although this Court made a similarly expansive statement in *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540 (1983),[10] the only authority it cites to support this claim is *Perry*, a First Amendment case. See *id.*, at 545. Furthermore, *Taxation With Representation* is itself a First Amendment case, where this Court held that there was no First Amendment right to require Congress to give tax-exempt status to non-profit organizations that engaged in lobbying. See *ibid.* Any implication that *Perry* extends beyond the First Amendment is dictum.

Other decisions demonstrate the First Amendment limits of *Perry* more directly. In *Connick* v. *Myers*, 461 U. S. 138 (1983), this Court traced the development of the rights of public employees. It noted that initially, "the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment—including those which restricted the exercise of constitutional rights." *Id.*, at 143. The *Connick* Court then traced the history of the public employee rights cases, see *id.*, at 144, and came to the following conclusion. "In *all* of these cases, the precedents in which *Pickering* [v. *Board of Education*, 391 U. S. 563 (1968)] is rooted, the invalidated statutes and actions sought to suppress the rights of public employees *to participate in public affairs*." 461 U. S., at 144-145 (emphasis added). *Perry*, one of *Pickering*'s "progeny" *id.*, at 143, stands for the principle that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Id.*, at 142. This is the proper limit of *Perry*.

The limits on *Perry* were in place even before that decision was written. An integral part of *Perry* was the rule that whether a benefit was a right or privilege was irrelevant to what conditions the government could place on the exercise of the benefit. As *Perry* noted, "respondent's lack of a contractual or tenure 'right' to re-employment . . . is immaterial to his free speech

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10. "The government may not deny a benefit to a person because he exercises a constitutional right." 461 U. S., at 545.

claim." 408 U. S., at 597-598. The precedent that discredited the right-privilege distinction was grounded in the First Amendment.

> "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that *the liberties of religion and expression* may be infringed by the denial of or placing conditions upon a benefit or privilege." *Sherbert* v. *Verner*, 374 U. S. 398, 408 (1963) (emphasis added).

In a dim, discredited part of this Court's past, some decisions applied the unconstitutional conditions doctrine outside the First Amendment. These cases reached their apex in *United States* v. *Chicago, M. St. P. & P. R. Co.*, 282 U. S. 311 (1931), which stated, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *Id.*, at 328-329. This rule was fashioned to protect the substantive due process doctrine typified by the discredited *Lochner* v. *New York*, 198 U. S. 45 (1905). See Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1416 (1989). It "was invented by a laissez-faire Court bent on dismantling progressive legislation that reduced the liberty of corporations . . . ." *Id.*, at 1505.

Unless this Court is willing to return to "Mr. Herbert Spencer's Social Statics," *Lochner*, *supra*, 198 U. S., at 75 (Holmes, J., dissenting), these decisions have no relevance to modern cases. *Chicago, M. St. P. & P. R. Co.* and its antecedents "produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism *foredoomed to reversal*." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 230, n. 9 (1948) (emphasis added). The rights these decisions sought to protect are no longer the law, and their legal philosophy has been thoroughly discredited by this Court.

See *Ferguson* v. *Skrupa*, 372 U. S. 726, 731-732 (1963). They are no longer valid, and cannot be applied to the present case.[11]

There are good reasons for this Court's decision to limit this doctrine to the First Amendment. The First Amendment protects a particularly important and fragile set of rights. In the public employment cases,

> "[t]he issue was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the ' "highest rung of the hierarchy of First Amendment values," ' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)." *Connick*, *supra*, 461 U. S., at 145.

The special needs of the First Amendment are found elsewhere also. The doctrine of overbreadth, for example, gives claimants who are not engaged in constitutionally protected

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11. Nor can *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987) be invoked to extend the government benefits doctrine beyond the First Amendment, despite the assertions of some. Cf. Sullivan, *supra*, 102 Harv. L. Rev., at 1463. In *Nollan*, the California Coastal Commission conditioned its permission to allow Nollan to build on his property on granting a public easement through his property. *Id.*, at 828. The Court found that this was a taking. *Id.*, at 837. It also found that this was not a government benefits decision, holding that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.' " *Id.*, at 833-834.

conduct the standing to attack a statute on the ground that it may violate the First Amendment rights of others not before the Court. See, *e.g.*, *Lewis* v. *City of New Orleans*, 415 U. S. 130, 133-134 (1974). This doctrine, which is limited to the First Amendment, see *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), contrasts with the general rule of standing in constitutional cases that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U. S. 17, 21 (1960). Fourth Amendment claims, such as the claim in the present case, are subject to this usual rule of standing. The exclusionary rule is limited "to defendants who have been subjected to a violation of their Fourth Amendment rights." *United States* v. *Salvucci*, 448 U. S. 83, 95 (1980).

Another example of the special needs of the First Amendment is found in the rule that the government may only regulate the content of protected speech if it uses "the least restrictive means" of advancing a compelling interest. See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). Although a least restrictive means test is invoked in a few other constitutional areas, see, *e.g.*, *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (state regulations affecting interstate commerce), it does not apply in Fourth Amendment cases. See, *e.g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 629, n. 9 (1989); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556-557, n. 12 (1976).

The *Perry* dictum should be similarly limited to the First Amendment. It deals with an important but limited concern—the ability of the government to use its resources to "buy" the suppression of unwanted speech, beliefs, or associations. This focus is most vividly demonstrated in the area of subsidies. In *Taxation With Representation*, *supra*, this Court upheld tax regulations denying tax exemptions to organizations that engaged in lobbying. The basis of the decision was that government was free to give and withdraw subsidies so long as the action is "not '"aimed at the suppression of dangerous ideas"' . . . ." *Taxation With Representation*, *supra*, 461 U. S., at 550 (quoting *Cammarano* v. *United States*, 358 U. S. 498, 513 (1959)).

Outside of the suppression of ideas, the government's " 'power to encourage actions deemed to be in the public interest is necessarily far broader.' " 461 U. S., at 550 (quoting *Maher* v. *Roe*, 432 U. S. 464, 476 (1977)).

Similar considerations motivate the *Perry* line. Not all First Amendment activity is beyond the power of the government's purse. The primary purpose of the government employee cases was the protection of a core First Amendment right, "speech on matters of public concern." *Connick*, *supra*, 461 U. S., at 145. The limits of *Perry* are not beyond, but are instead within, the First Amendment. So long as it does not suppress ideas, the government may place conditions on "benefits."

> "*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, *government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary* in the name of the First Amendment." *Id.*, at 146 (emphasis added, footnote omitted).

The Fourth Amendment does not deal with the suppression of ideas and therefore should not be subject to the *Perry* dictum. Whatever may be the actual scope of *Perry*, "its antecedents, and its progeny," these decisions are irrelevant to the present case.

IV. The requested consent is voluntary because the request is rationally related to a legitimate government purpose.

A. Deferential Standard.

When this Court approved contractual consents in *Zap* v. *United States*, 328 U. S. 624 (1946), it placed no concrete limits on the government's ability to obtain consent to searches through mutual consideration. The closest it came to placing any limits on the government's bargaining power was the somewhat cryptic statement "[w]hatever may be the limits of that power of inspection, they were not transcended here." *Id.*, at 628.

This should not be used to attack *Zap* as an overly broad grant of government power. *Zap* does not stand for the proposition that the government has unfettered power to bargain for constitutional rights. There are some limits to the bargains the government can obtain from individuals. But these limits are very narrow and must be carefully circumscribed. As the consent requested in the present case does not exceed these limits, the School District's consent requirement is constitutional under *Zap*.

One limit on the government's bargaining power has been discussed earlier, although it is inapplicable to the present case. As the government benefits decisions demonstrate, the First Amendment prohibits government from "purchasing" the suppression of ideas through its power to bargain with individuals. See Part III, *ante*, at 18-25.

If, as in the present case, core First Amendment values are not threatened, then the government has much more freedom to bargain. See *Connick* v. *Meyers*, 461 U. S. 138, 146 (1983). This deference stems from the principle that the courts should not second-guess the correctness of government policies. See *Mansell* v. *Mansell*, 490 U. S. 581, 594 (1989). This embodies the simple wisdom that for the most part government should be able to conduct its daily business "without intrusive oversight by the judiciary . . . ." *Connick*, *supra*, 461 U. S., at 146.

There are many fields in which this Court has determined that the Constitution must play a small role in restraining government action. An excellent example of this is this Court's review of legislation under the Equal Protection Clause and substantive due process. Beginning with the landmark decision *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153 (1938), this Court has upheld economic and social welfare legislation that did not involve a suspect classification, or the abridgment of a fundamental right, if the legislation is rationally related to a legitimate government interest. See, *e.g.*, *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U. S. 483, 491 (1955); *McDonald* v. *Board of Election Comm'rs*, 394 U. S. 802, 808-809 (1969); *Plyler* v. *Doe*, 457 U. S. 202, 216 (1982). This low level of scrutiny is borne out of deference to government action in those areas that do not pose a distinct threat to crucial constitutionally protected interests. "[T]he judiciary may

not sit as a superlegislature to judge the wisdom or desirability of legislature policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).

The rational basis test allows the government its necessary freedom of action, while maintaining some check on its power. While it is rare for legislation to fail this test, see 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 15.4, at 411 (2d ed. 1992), the rational basis test does have teeth. See, *e.g.*, *Cleburne* v. *Cleburne Living Center*, 473 U. S. 432, 450 (1985); *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612, 622 (1985). Most of the time, however, the government is able to conduct its affairs free of judicial intrusion.

Similar deference should be extended to consent-to-search bargains. This Court traditionally defers to the parties' judgment in reviewing agreements between an individual and the government. Thus, this Court will not vacate a guilty plea simply because the defendant, in negotiating the plea, "made a strategic miscalculation," and negotiated a bad deal. See *United States* v. *Broce*, 488 U. S. 563, 571-572 (1989). Barring involuntariness or misrepresentation, the courts will not vacate these important agreements. See *id.*, at 572. Evaluating bargains with the government under the rational basis test is consistent with prior practice. In *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986 (1984), this Court allowed the federal government to condition the economic advantages of its approving pesticides on the pesticide maker giving up certain trade secrets. See *id.*, at 1007. This agreement was valid so long as "the conditions are rationally related to a legitimate Government interest." *Ibid.* So long as the conditions are not arbitrary, there is no fear that the government is imposing its will on a powerless individual.

The agreement that the Ninth Circuit voided in the present case deserves similar respect. There has been no allegation of misrepresentation or similarly "impermissible conduct by state agents." See *Brady* v. *United States*, 397 U. S. 742, 757 (1970); *Bumper* v. *North Carolina*, 391 U. S. 543, 549-550 (1968) (search pursuant to false claim that the police had a warrant cannot be consensual). The consent the School District obtains through its search condition is voluntary. Those students who sign the consent form will know that they may avoid the

search by refraining from participation in interscholastic athletics. Such knowing and intelligent waiver exceeds the voluntariness standard for consent to searches. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 241 (1973).

The only concern with this consent is that the School District used its power to exclude students from interscholastic athletics to coerce their consent. This argument is based on this Court's decision in *Perry* v. *Sindermann*, 408 U. S. 593 (1972). See, *e.g.*, *University of Colorado* v. *Derdeyn*, 863 P. 2d 929, 947-950 (Colo. 1993). Part III of this brief, which demonstrates that *Perry* is limited to the First Amendment, undermines this claim of coercion. Indeed, the very existence of plea bargains demonstrates that the government may validly condition a benefit upon the individual's waiving a right outside the First Amendment. See *ante*, at 11-13. Like plea bargains, the consent in the present case is voluntary.

The rational basis test lays to rest any remaining fears of the government abusing its power to bargain. Its substantial, but not complete, deference allows governments and individuals to reach bargains free from judicial interference while preventing truly arbitrary uses of government power. So long as the requested consent has a rational relationship to a legitimate government interest, the courts should not interfere.

B. Satisfying the Standard.

The consent to drug testing requested by the Vernonia School District is rationally related to a legitimate government interest. Drugs are one of the gravest problems facing society in general, see *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 674 (1989), and schools in particular. See *New Jersey* v. *T. L. O.*, 469 U. S. 325, 339 (1985). The problem can be particularly acute at the intersection of schools and competitive sports.

Competitive sports has its own dynamic that can, if left unchecked, encourage widespread use of dangerous, illegal drugs by the participants.

> "Historically, the primary purpose of drug testing of athletes has been to ensure fair competition by discouraging the use of performance-enhancing drugs. The essence of sport has always been competition between athletes based on their

> individually developed natural abilities, not on the basis of who can find the most effective chemicals. But in a society that is increasingly drug-conscious and has given ever-greater accolades to 'winners,' it seems inevitable that many athletes will turn to the use of drugs in order to win." E. Zemper, Drug Testing in Athletics, in Drug Testing: Issues & Options 113, 116 (R. Coombs & L. West eds. 1991).

The mixture of drugs and sports creates an additional problem. The physical nature of competitive sports creates an inherent risk of injury. A participant under the influence of drugs increases the threat of injury to all. This risk helped motivate the search condition in the present case, where marijuana intoxication was suspected of being the cause behind a wrestler seriously injuring himself during the performance of a routine maneuver. *Acton* v. *Vernonia School District 47J*, 23 F. 3d 1514, 1516 (CA9 1994). Furthermore, the competitive advantage given by some illegal drugs can only lower an athlete's resistance to the many pressures to use illegal "recreational" drugs.

Stopping this is an immensely important interest, and the drug testing is more than rationally related to its furtherance. Random drug testing, coupled with some adverse civil consequences for failing the test, is an adequate way to deter drug use. See *Treasury Employees*, *supra*, 489 U. S., at 676. The drugs the test is designed to spot, "creatinine, amphetamines, cocaine, marijuana and LSD," *Acton*, *supra*, 23 F. 3d, at 1517, pose a real threat to interscholastic athletics. A student performing under the influence of any of these substances could be a genuine physical threat to the student himself or other participants. "[T]he use of drugs present[s] a particular threat to athletes and cheerleaders. Due to alterations of mood, reduction of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes is particularly threatened." *Schaill by Kross* v. *Tippecanoe County School Corp.*, 864 F. 2d 1309, 1320 (CA7 1988).[12] Two of the tested drugs, cocaine and amphetamines, are performance-enhancing drugs

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12. It is worth noting that the student in the present case, James Acton, sought to try out for football, a particularly violent sport where intoxication could be especially dangerous.

that are tested for by the International Olympic Committee. Drug Testing in Athletics, *supra*, at 117. Random testing can only make interscholastic athletics safer. The test is not arbitrary, and is thus constitutional.

Although a balancing of interests is not necessary to satisfy the rational basis test, it is worth noting that the requested testing is not particularly intrusive. The potential intrusiveness of urine tests can be minimized by such factors as advance warning, see *Treasury Employees*, *supra*, 489 U. S., at 672, n. 2, and relationships that decrease a person's expectation of privacy. The intrusiveness of the search in the present case is minimized by the considerable advance notice given to students. Furthermore, in athletics, with its communal dressing and showering, there is considerably less interest in privacy at risk. See, *e.g.*, *Hill* v. *NCAA*, 7 Cal. 4th 1, 41-42, 865 P. 2d 633, 658 (1994); *Schaill*, *supra*, 864 F. 2d, at 1318. The School District is simply asking to limit a privacy interest that is already considerably reduced.

The Ninth Circuit deprived Vernonia and its student-athletes of the benefit of this bargain. This bargain was not illusory. In exchange for a minimal intrusion of their privacy, students got in return a safer sport, with fewer pressures to use dangerous, performance-enhancing drugs. The courts have no right to break this bargain.

CONCLUSION

The decision of the Ninth Circuit should be reversed.

January, 1995

Respectfully submitted,

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No. 94-590

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,
v.
WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Vernonia School District's random drug testing program for student athletes is reasonable under the Fourth Amendment.

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Committee on School Health, American Academy of Pediatrics, *School Health: A Guide for Health Professionals, 1987 Revision* (1987)	10, 11

TABLE OF AUTHORITIES—Continued

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Robert H. Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Robert H. Coombs & Louis Jolyon West, eds., *Drug Testing: Issues and Options* 202 (1991) 14, 24, 25

Dr. Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* Herb Appenzeller, *Managing Sports and Risk Management Strategies* 90 (1993) 11-12, 18

Richard A. Hawley, *The Bumpy Road to Drug-Free Schools,* 72 Phi Delta Kappan 310 (Dec. 1990) 11

Michael Janofsky, "Drug Use Rising Among Teen-Agers, Study Says," *New York Times,* Dec. 13, 1994 at A1 ..... 2, 19

Lloyd D. Johnston *et al., National Survey Results on Drug Use from Monitoring the Future Study, 1975-1993* (National Institutes of Health 1994) .. 2

Irvin A. Keller & Charles E. Forsythe, *Administration of High School Athletics* (7th ed. 1984) 22

John Leland, "Just Say Maybe," *Newsweek,* Nov. 1, 1993, at 51 19

Wilbert Marcellus Leonard II, *A Sociological Perspective of Sport* (4th ed. 1993) 19

Andrew W. Miracle, Jr., and C. Roger Rees, *Lessons of the Locker Room: The Myth of School Sports* (1994) 14, 18, 19, 20

Richard A. Posner, *Economic Analysis of Law* (3d ed. 1986) 27

William C. Rhoden, "Athletes At Risk Too Often," *New York Times,* Dec. 11, 1993 at 31 21

William C. Rhoden, "Deaths of Youthful Athletes Raise Questions Over Testing," *New York Times,* March 14, 1994 at A1 20-21

M.F. Stuck, *Adolescent Worlds: Drug Use and Athletic Activity* (1990) 17, 18

Deborah Klein Walker *et al., Children's Health Care and the Schools, in* Mark J. Schlesinger & Leon Eisenberg, eds., *Children in a Changing Health System: Assessments and Proposals for Reform* 265 (1990) 10, 23

TABLE OF AUTHORITIES—Continued

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Eric D. Zemper, *Drug Testing in Athletics, in* Robert H. Coombs & Louis Jolyon West, eds., *Drug Testing: Issues and Options* 113 (1991) 23

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Public education is "perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); *see also Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). The ability of States and local school districts to implement policies which will enable them to appropriately carry out their educational mission

and to preserve the health and safety of their students is therefore of central importance to *amici*.

Drug abuse is on the rise in our nation's schools, presenting risks to the health and education of students. Results of a study released last month indicate that illicit drug use is increasing among secondary school students. *See* Michael Janofsky, "Drug Use Rising Among Teen-Agers, Study Says," *New York Times*, Dec. 13, 1994 at p. A1 (reporting results of nationwide annual survey conducted by the University of Michigan's Institute for Social Research). Of particular concern is heightened drug use among middle school students. For example, the study found that "eighth graders were using marijuana at a higher rate than in prior years," with 13% reporting usage within the past year, up from 7.2% in 1992. *Id.; see* 1 Lloyd Johnston *et al., National Survey Results on Drug Use from Monitoring the Future Study, 1975-1993* 24 (National Institutes of Health 1994) (by the end of eighth grade, 32% of American students have tried an illicit drug; 47% have done so by the end of twelfth grade).

The court of appeals' ruling strikes down a reasoned program implemented as a last resort, after careful deliberation and consultation with parents, *see* Pet. App. 84a-88a, by a school district in which substance abuse had become so pervasive as to seriously compromise the schools' educational mission and the District's ability to protect student athletes from injury, *see id.* at 79a-84a. Given the tremendous destructive potential of drugs and alcohol, this limitation on schools' authority to meaningfully address such a severe crisis is of significant concern.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amici curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt petitioner's statement of the case.

SUMMARY OF ARGUMENT

Because the Fourth Amendment prohibits only unreasonable searches, "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (citation omitted). This reasonableness inquiry is fact-intensive and requires careful consideration of the circumstances and context of a particular search. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). An examination of the facts of this case demonstrates that the intrusion occasioned by the Vernonia drug testing program was far outweighed by the School District's compelling interests in restoring sufficient discipline to enable education to take place, and in protecting the health and safety of its students.

1. As the Court has observed, "[s]ome modicum of discipline and order is essential if the educational function is to be performed." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Hence, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969). In the Vernonia schools, widespread and flagrant drug abuse led to a complete breakdown of discipline. *See* Pet. App. 80a-87a. The School District clearly had a compelling interest in restoring an environment in which learning could take place.

The School District also has a compelling interest in protecting the health and safety of its students. Schools have long served a health mission in the community, and are routinely involved in providing preventive care to

schoolchildren. Given this role, the schools' compelling interest in combatting drug use, "one of the greatest problems affecting the health and welfare of our population," *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989), is beyond question. This interest is particularly acute with respect to student athletes, whose drug use presents unique health hazards, as well as the potential for serious injury. *See, e.g.*, J.A. 69-70, 72.

The School District's drug testing program was extremely effective in turning back the epidemic of drug abuse in the Vernonia schools and achieving these compelling interests. *See* Pet. App. 34a; J.A. 43. Moreover, given the District's lack of success with numerous alternatives, it appears that no other approach could have been as effective. While a measure need not be the "least intrusive" alternative to be valid under the Fourth Amendment, the absence of other alternatives capable of achieving the District's compelling interests weighs heavily in favor of the program's reasonableness.

2. While "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances," *Von Raab*, 489 U.S. at 671, a number of factors present in this case serve to decrease the level of intrusion. The testing program was narrowly targeted at a single extracurricular activity in which drug use and discipline problems were prevalent, the risks associated with drug use were at their height, unique incentives to use drugs existed, and changes in behavior could be expected to have the largest effect on the student body as a whole. *See, e.g.*, Pet. App. 117a.

The narrow tailoring of the testing program to interscholastic athletics is also significant given the fact that student athletes are already subject to numerous rules and regulations governing their behavior, including the requirement that they submit to a physical examination which includes providing a urine sample. *See* Pet. App. 94a &

n.2. The nonpunitive nature of the consequences of failing or refusing to take a drug test further reduce the intrusion. Positive test results "are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." Pet. App. 121a-22a.

3. When the compelling governmental interests achieved by the testing program are balanced against the intrusion which the testing requires, it is clear that the program is not unreasonable under the Fourth Amendment. The court of appeals' contrary conclusion is largely based on its erroneous view that suspicionless testing is justified only where the risk of a dramatic, discrete, mass disaster is presented—"some additional horrible element, some terrible threat to safety . . . some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." Pet. App. 58a.

Not only does this approach discount the fact that very serious injury and death can result from drug use by student athletes, it also fails to take into account the fact that the probability as well as the severity of a given harm is relevant to the reasonableness inquiry. In this case, the disaster—the inability of the District to educate its students and protect them from injury—was already well underway when the District took action.

ARGUMENT

VERNONIA'S SUSPICIONLESS DRUG TESTING PROGRAM IS REASONABLE UNDER THE FOURTH AMENDMENT

The Fourth Amendment prohibits only "unreasonable searches and seizures." U.S. Const. amend. IV; *see Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 618-19 (1989). In assessing reasonableness under the Fourth Amendment, the Court has used a balancing approach whereby "the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Id.* at 619 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).[2] Because "what is reasonable depends on the context within which a search takes place," *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985), the Court has followed "the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989).[3]

---

[2] *See also New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'") (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) (in determining whether a particular search is reasonable, "the answer depends largely upon the social necessity that prompts the search").

[3] It is clear that none of those elements is required here. Because the testing is conducted in a school setting, neither a warrant nor probable cause is required. *See T.L.O.*, 469 U.S. at 340-41. Moreover, respondents concede, as they must, that individualized suspicion is not a necessary element for finding a school-based search reasonable under the Fourth Amendment. *See* Opp. 44.

The Court's cases establish that individualized suspicion is not necessary for reasonableness "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," *Von Raab*, 489 U.S. at 665-66, as where there is a compelling need to discover or prevent "latent or hidden conditions." *Id.* at 668; *see also Skinner*, 489 U.S. at 624. Vernonia's drug testing plainly serves special governmental needs unrelated to law enforcement. Test results are not turned over to law enforcement authorities, Pet. App. 121a; instead, the program is designed to deter and treat drug use among student athletes. Moreover, drug use and impairment is a "latent or hidden condition[]" which makes a requirement of individualized suspicion impracticable. *See* pp. 15-16, *infra* (discussing inability to detect drug impairment among students).

The inquiry into reasonableness is, therefore, a fact-intensive one, the outcome of which turns on a particularized assessment of the circumstances surrounding, and interests implicated by, a given search. An examination of the facts surrounding the Vernonia drug testing program demonstrates that the intrusion occasioned by the program was clearly outweighed by the School District's compelling interest in turning back an epidemic of substance abuse which had drastically compromised its educational mission, and had resulted in actual and potential injuries and health hazards to its students.

A. The Vernonia Testing Program Serves Compelling Governmental Interests

The School District's testing program serves two compelling governmental interests, either of which would alone be sufficient to outweigh the intrusion occasioned by the test: first, the restoration of discipline sufficient to enable the District to perform its educational mission; and second, the amelioration of a dangerous situation that was threatening the health of its students and the safety of its athletes.[4]

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[4] *Amici* agree with petitioner that, in light of *T.L.O.*, it is questionable whether a compelling governmental interest is required for reasonableness, rather than merely a substantial governmental interest. *See* Pet. 38; *id.* at 35-36. That question need not be resolved in this case, however, since the governmental interests at issue here are plainly compelling ones.

1. *The School District Has A Compelling Interest In Maintaining Sufficient Discipline To Fulfill Its Educational Mission*

Because of its pervasive impact on the quality of life and the well-being of the citizenry, "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). Clearly, States and local school districts have a compelling interest in meaningfully carrying out that function. *See T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). As the Court has observed, the maintenance of "[s]ome modicum of discipline and order is essential if the educational function is to be performed." *Goss v. Lopez*, 419 U.S. 565, 580 (1975). Justice Powell made a similar observation in *T.L.O.*:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students.

469 U.S. at 350 (Powell, J., concurring).[5]

Thus, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States

[5] Justice Powell elsewhere elaborated on the importance of discipline to the educational function of the school:

> Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools.

Goss, 419 U.S. at 593 (Powell, J., dissenting); *see also Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 524 (1969) (Black, J., dissenting) ("School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.").

and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 507 (1969); *see also Goss*, 419 U.S. at 589-90 (Powell, J., dissenting). The Court has also emphasized that "[a]ssessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law." *Ingraham v. Wright*, 430 U.S. 651, 681-82 (1977).

Drug abuse, which the Court has characterized as "one of the most serious problems confronting our society today," *Von Raab*, 489 U.S. at 674, plainly threatens the maintenance of discipline essential to the educational mission. As the Court observed in *T.L.O.*, "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." 469 U.S. at 339 (citations omitted); *see also Goss*, 419 U.S. at 591-92 (Powell, J., dissenting).

The record is replete with evidence that drug use at the Vernonia schools was so pervasive that it led to a complete breakdown of discipline, making the fulfillment of the educational mission impossible. *See* Pet. App. 86a-87a ("[d]isciplinary actions had reached 'epidemic proportions,'" with "an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use," leading the administration to conclude, at one point, "that the only practical solution was mass expulsion"); *see generally* Pet. App. 80a-81a; 83a-87a. The District unquestionably had a compelling interest in alleviating that problem and restoring an environment in which learning could take place.

2. *The School District Has A Compelling Interest In Preserving The Health And Safety Of Its Students And In Preventing Injury To Student Athletes*

While education is the primary mission of the schools, preserving the "safety of schoolchildren" who are "compel[led] to attend school" is also of paramount importance. *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). Schools have long served a health mission in the community, dating back to the last decade of the nineteenth century, when increasing enrollments began to present a heightened risk of the spread of contagious diseases. *See* Committee on School Health, American Academy of Pediatrics, *School Health: A Guide for Health Professionals, 1987 Revision* 2 (1987).[6]

Schools are often actively involved in the delivery of preventive health care to children.[7] For example, "[m]ost of the 16,000 public school districts in the United States now provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." *School Health* at 2. Similarly, "[m]ass immunization programs can be efficiently performed in schools." *Id.* at 156. Such school-based health services are well established and broadly

[6] *See also* Deborah Klein Walker *et al., Children's Health Care and the Schools, in* Mark J. Schlesinger & Leon Eisenberg, eds., *Children in a Changing Health System: Assessments and Proposals for Reform* 265, 265 (1990). Schools have often advanced children's health by performing a "gatekeeping function," *id.* at 285; for example, most States require certain immunizations for school entry. *See id.* at 268 (Table 11.1). The Court has long recognized the legitimacy of state action directed at maintaining health and controlling the spread of contagious disease. *See, e.g., Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding compulsory smallpox vaccinations).

[7] "Because of the concentration of children in schools, there are major potential economies of scale in delivering a wide range of preventive services, including screening for health conditions and health education . . . ." Walker, *Children's Health Care and the Schools, in* Schlesinger & Eisenberg, *Children in a Changing Health System* at 265-66.

accepted, despite the fact that they may involve some degree of intrusion. *See, e.g., id.* at 208 (scoliosis screening requires student's back to be exposed during examination).

The health risks associated with drug use are well established and at least as compelling as the risks associated with other health threats for which schools routinely screen. *See Von Raab*, 489 U.S. at 668 (describing drugs as "one of the greatest problems affecting the health and welfare of our population"). Moreover, drugs present special health hazards for adolescents, including neurological and developmental damage that directly undermines the schools' goal of education. *See* Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 Phi Delta Kappan 310, 314 (1990) ("Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound."). In addition, children are at great risk of developing chemical dependence. *See id.* ("children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor").

Drugs also present unique hazards for athletes. For example, the effects of amphetamines include "[a]n artificially induced heart rate increase, [p]eripheral vascoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them "very dangerous drug[s] when used during exercise of any type." Dr. Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* Herb Appenzeller, *Managing Sports and Risk Management Strategies* 90, 90-91 (1993). Marijuana can also have dangerous physical effects on athletes, including "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.* at 94. The "potentially deadly" effects of cocaine include "[v]asoconstriction,

[e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Id.* at 94. As expert witness Dr. Robert L. DuPont testified,

> cocaine in particular is a risk, not just in terms of playing through pain or not attending to the training that the person has, but also in terms of the heart danger because the athletics itself . . . always raise[s] the heart rate in competitive athletics to high levels. And you add to that the unpredictable effect of cocaine and you have a very dangerous combination.

J.A. 72.

The deleterious impact of drugs on judgment, reaction and coordination, and perception of pain can also have disastrous consequences for athletes. *See* Pet. App. 82a.[8] Dr. DuPont testified that participants in high school and middle school interscholastic athletics who use drugs are at "substantially greater risk" of injury to themselves and to others. J.A. 69.

Specifically, Dr. DuPont testified that drug use "leads people to take risks" and "not to follow instructions to reduce the risks." J.A. 70. Hence, drug impaired athletes are "operating outside of the guidelines that they have learned and, therefore, increase their probability that

[8] In *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1989), the Seventh Circuit, in upholding a drug testing program for student athletes similar to Vernonia's, relied on extensive testimony and factual findings at trial concerning the harm associated with drug use by student athletes:

> Due to alterations of mood, reductions of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes was particularly threatened. At trial, Jacob Burton, the assistant principal and athletic director at McCutcheon High School, testified to three instances in which athletes had admitted that injuries had been caused or exacerbated by drug impairment during athletic contests. In one instance, a baseball player misjudged a pitch and turned toward the ball, suffering a broken nose as a result.

Id. at 1320. *See also* Pet. App. 81a-82a; J.A. 55-56 (testimony of Coach Ronald Svenson).

they're going to have an injury." *Id.*[9] Significantly, an athlete using drugs presents a risk not only to himself, but also to those with whom he is competing. *See id.*[10] Thus, in competitive athletics, as in other situations in which drug testing has been approved by the Court, "even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628.

3. *The School District's Testing Program Was Uniquely Effective In Advancing Both Of These Compelling Governmental Interests*

The School District's testing program proved highly effective in ameliorating the substance abuse problems that had plagued Vernonia schools and in restoring discipline so that education could take place, student health be preserved, and needless athletic injuries be prevented. As the court of appeals noted, "[e]very teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented." Pet. App. 34a. Moreover, Vernonia Athletic Director Marcia King noted a decrease in athletic injuries after the program was implemented. J.A. 43.

[9] Exacerbating this risk to student athletes is the "highly competitive atmosphere" of interscholastic sports, which may discourage an athlete from disclosing injuries. *See* Pet. App. 82a-83a (discussing testimony of Ronald Svenson, a teacher and wrestling coach). As the district court noted, "[t]his sense of pride and desire to stay in the game, when coupled with the numbing influence of drugs, became a significant concern to all involved in the athletic program." *Id.* at 83a.

Moreover, there was concern that a badly injured student athlete requiring emergency medical care might fail to disclose his illicit drug use to medical personnel and thereby risk a potentially life-threatening drug interaction. J.A. 61 (testimony of Ronald Svenson).

[10] For example, athletes using drugs "might use a blocking technique that they were specifically trained was a risk to the other person" or a technique "that would put [themselves] at risk of a head injury or spinal cord injury or some other kind of injury." J.A. 70 (testimony of Dr. Robert L. Dupont).

The reason for the program's success is apparent. Quite simply, Vernonia's program provided students with "a compelling . . . incentive to stop using drugs," *see* Pet. App. 85a, by conditioning participation in interscholastic athletics, which is highly prestigious and much sought-after, on a clean drug test. *See* Andrew J. Miracle, Jr. & C. Roger Rees, *Lessons of the Locker Room: The Myth of School Sports* 108 (1994) ("star athletes . . . may indeed conform to socially acceptable behavior because it is necessary for maintaining athletic involvement"); *id.* ("High school athletes may be forced to conform to school norms by the threat of losing a valued activity . . . .").

The favorable results of the Vernonia program are also consistent with the results of a study of athlete drug testing at the university level. *See generally,* Robert H. Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Robert H. Coombs & Louis Joylon West, eds., *Drug Testing: Issues and Options* 202 (1991). In that study, "[m]ore than half of all respondents (52.8 percent) credited the drug-testing policy as giving them a socially acceptable way to refuse drugs." *Id.* at 210.[11] Presumably, the provision of a socially acceptable excuse for refusing drugs would be even more important at the middle school and high school level, where peer pressure is far more intense and students are making threshold decisions regarding drug use. Indeed, one of the explicit goals set forth in Vernonia's Student Athlete Drug Policy is "providing a legitimate reason for students to say 'no' to drug use." J.A. 7.

Finally, contrary to respondents' suggestion, *see* Opp. 38 n.12, there were no "less intrusive alternatives" which

[11] Moreover, a majority (62.4 percent) of the tested athletes agreed that "mandatory drug testing is an effective way to prevent drug use," and three-quarters (76 percent) agreed that testing "deters some athletes from substance use." *Id.* at 206. Factors such as "team loyalty" and "[f]ear that negative test results will jeopardize current and future opportunities" were important motivations. *Id.* As one athlete put it, "[d]rug testing has forced us to make a commitment to the team and has kept us clean." *Id.*

would have been effective in achieving these results.[12] The School District had already tried a number of alternatives, to no avail. *See* Pet. App. 84a-85a. As Ralph Aultman, principal of the Vernonia grade school, testified,

> We would have kids get suspended. . . . [Disciplinary] referrals were very, very high. There [were] two or three expulsions. We'd try everything in our power from punitive discipline to having our staff work with kids, to bringing in drug dogs and authorities and speakers and like I said, we spent a lot of money trying every resource at our command to stop the problem.

J.A. 25.

Significantly, testing based on individualized suspicion of drug use, an alternative urged by respondents, Opp. 38 n.12, and alluded to by the court of appeals, Pet. App. 59a-60a, would be wholly ineffective. As expert testimony presented below establishes, adolescents' impairment from drug use is often impossible to detect. Dr. DuPont testified that teachers, coaches, and administrators in a high school or middle school would have virtually no ability to determine through observation which students were under the influence of drugs and alcohol, and that "even if they were specifically trained they would miss . . . more than 90 percent of the impairment caused by drugs and alcohol." J.A. 67.

Because of these difficulties, "[t]he only standard [for determining impairment] is the drug test." *Id.* Despite extensive study with other forms of impairment tests, "none of these have proved useful in any setting whatso-

[12] The Court has made clear that the Fourth Amendment does not require government actors to implement the least intrusive alternative, since such a requirement would lead courts to "second-guess" decisions made after careful consideration by governmental bodies. *Skinner,* 489 U.S. at 629 n. 9. Nevertheless, the absence of less intrusive alternatives in this case weighs in favor of the reasonableness of the District's action.

ever as an alternative to the drug test." J.A. 74.[13] Forcing teachers and administrators to make use of such ill-suited tools for detecting drug use would not only be ineffective, it would also further divert energy and attention from the school's primary function—educating students. *Cf. T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring) ("A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker.").

B. The Vernonia Testing Program Is Narrowly Tailored And Implemented In A Manner Which Minimizes Intrusion

Requiring a urine sample unquestionably involves some degree of intrusion. Indeed, the Court has noted that "[t]he interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances." *Von Raab*, 489 U.S. at 671. But, as the Court has made clear, the degree of intrusiveness implicated in a specific urine testing situation depends on a number of factors, including the scope and context of the testing, the expectations of privacy of those being tested, and the purpose, design, and consequences of the test itself. *See id.*

[13] As Dr. Dupont testified,

> [T]here has been a very large effort made to find suitable impairment tests. And the basic reasoning for this is to find some kind of a screening test that would be the equivalent of the roadside sobriety test to establish probable cause or a reasonable basis for a drug test. . . . It's a major funding area of the National Institute on Drug Abuse. The simple summary of the report of that work is that, with some interesting exceptions, it has not proven to be of any value. In fact, it actually creates problems when these sorts of tests are introduced, because the tests are not well correlated with drug use or drug-caused impairment; they both under identify drug problems and over identify other problems. So that they end up missing large numbers of people who have drug-caused impairment, and they include people who have no impairment whatsoever in them. They're also extremely subject to subversion.

J.A. 73-74.

at 668-75; *Skinner*, 489 U.S. at 620-21, 624-34. In this case, all of these factors serve to minimize intrusion.

1. *Limiting Drug Testing To Interscholastic Athletes Minimizes Intrusion*

Instead of requiring drug testing of all students, "the Vernonia policy is limited to the one activity which, in that community, is likely to have the greatest impact on the drug and alcohol abuse problem given the documented evidence of incidents involving particular students." Pet. App. 117a. The School District's tailored approach, which was successful in providing a schoolwide resolution of Vernonia's severe drug and alcohol epidemic, was appropriate and effective for a number of reasons.[14]

First, the record establishes that substance abuse was widespread in the schools' interscholastic athletic programs. The involvement of adolescent athletes in drug and alcohol abuse is not unusual.[15] Concentrating drug eradication efforts on interscholastic athletes makes sense given the fact that such athletes are consistently placed in positions in which their drug usage poses particularly severe hazards to themselves and to others on the field. *See* pp. 11-13, *supra*. Moreover, the nature of the athletic competition itself provides student athletes with an incentive to use drugs in the hopes of enhancing their performance or to dull pain so that they can continue playing. As Vernonia Superintendent Ellis Mason testified, "student athletes have reasons to take drugs which other students don't"; for example, they may use drugs to "get pumped up for a game, play with pain or eliminate pain so they could play." J.A. 84.

[14] No equal protection challenge based on the differential treatment of athletes and nonathletes is presented here. Based on the factors discussed below which justify such differential treatment, however, it is clear that such a challenge would fail.

[15] As one researcher studying adolescent drug use concluded, "athletes do use drugs, and . . . participation in athletics and drugs go hand in hand." M.F. Stuck, *Adolescent Worlds: Drug Use and Athletic Activity* 64 (1990).

In research on adolescent drug use conducted by M.F. Stuck, "[a]thletes who used marijuana gave a reason related to sports performance. It was their belief that being high while engaged in sports enhanced performance in some way or another." M.F. Stuck, *Adolescent Worlds: Drug Use and Athletic Activity* 79-80 (1990) (footnote omitted). For example, one student athlete explained his marijuana use as follows: "I love playing sports when I'm high . . . . I have more energy, I can concentrate more." *Id.* at 81. Similarly, a student participating in track stated that he used speed "[c]ause it helped me run. It kept me going . . . I can run farther." *Id.* at 73; *see id.* at 81; Dr. Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance, in* Herb Appenzeller, *Managing Sports and Risk Management Strategies* 90 (1993) ("amphetamines are generally used by athletes to produce a feeling of stimulation or 'being up' to attempt to delay fatigue or to increase aggression"). Other athletes reported taking "codeine in order to be able to continue playing while injured." Stuck, *Adolescent Worlds* at 81. Thus, "sport for some . . . may be the very reason for use of certain drugs." *Id.*; *see* Andrew W. Miracle, Jr., and C. Roger Rees, *Lessons of the Locker Room: The Myth of School Sports* 112-13 (1994).

Moreover, the record reflects that Vernonia athletes were the ringleaders in drug and alcohol abuse, and that their substance abuse threatened "a significant poisoning impact on the broader student population." *See* Pet. App. 83a-84a. As Dr. DuPont explained, the behavior of "leaders" among the peer group—those "at the top of th[e] status hierarchy"—"play[s] a very powerful role in terms of shaping the behavior of large numbers of students in the classes." J.A. 68. Thus, "what they do about drugs makes an enormous difference about what other kids are going to do." *Id.*

In Vernonia, athletes are the primary peer leaders whose behavior other students seek to copy. *See* Pet. App. 116a. This is typical of American schools, in which

"[g]roups are formed and prestige is bestowed largely on the basis of sport. Traditionally athletes have occupied positions of higher status in American schools than those who excelled in academics, art, music, or any other skill area." Miracle & Rees, *Lessons of the Locker Room* at 224.[16] The use and glorification of drugs by Vernonia's student athletes thus presented a significant threat to the student body as a whole by reinforcing the growing glorification of drugs in society at large.[17] The School District reasonably concluded that reducing drug use among athletes would have a positive spillover effect on other Vernonia students who seek to emulate their behavior. *See* Pet. App. 116a.

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[16] In 1961, James S. Coleman published groundbreaking research indicating that high school athletes are given paramount status by their peers, that star athletes are highly visible and readily identifiable, and that their behavior is emulated by younger students. *See generally* James S. Coleman, *The Adolescent Society: The Social Life of the Teenager and Its Impact on Education* (1961); *see id.* at 147 ("Overall, it appears that athletic stardom stands highest as a symbol of success, as an achievement to channel the energies of the naive freshman, as a means of entry into the leading crowd, as a way to gain popularity with girls, and as the man with most friends."); *id.* at 301 ("The boys who 'stand out' most among the upperclassmen are athletes; they are the only models [an incoming freshman] has to emulate in his early and impressionable weeks in high school."). Coleman's research has been replicated several times. *See* Wilbert Marcellus Leonard II, *A Sociological Perspective of Sport* 319-21 (4th ed. 1993). *Cf.* Miracle & Rees, *Lessons of the Locker Room* at 103 ("[y]oung athletes become role models for the community and the country").

[17] *See, e.g.*, Janofsky, "Drug Use Rising Among Teen-Agers, Study Says" *New York Times*, Dec. 13, 1994, at A1 (increased drug use by teenagers "attributed to 'glamorizing' of drugs by the entertainment industry"); John Leland, "Just Say Maybe," *Newsweek*, Nov. 1, 1993, at 51 ("What is clear, and arresting, is the rise of a popular culture that actively glorifies drug use. There is a sea change in attitudes, if not in actual use: an emerging population that openly espouses that drugs—at least some drugs—are no big deal.").

2. *Interscholastic Athletes, By Virtue Of Their Participation In A Pervasively Monitored Activity, Have A Diminished Expectation Of Privacy*

Also relevant to the intrusiveness inquiry is whether the search takes place within the context of an activity or industry that has been pervasively regulated. Participants in such activities have a reduced expectation of privacy by virtue of the preexisting regulation. In *Skinner*, for example, the Court found that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." 489 U.S. at 627. Thus, while the Court recognized that "some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information." *Id.* at 628. *See also Von Raab*, 489 U.S. at 671 ("certain forms of public employment may diminish privacy expectations" such as those demanding "intrusive inquiries into [employees'] physical fitness").

Like the railroad employees in *Skinner* who "ha[d] long been a principal focus of regulatory concern," 489 U.S. at 628, student athletes are subject to numerous rules and requirements. *See Schaill*, 864 F.2d at 1318-19. Much of this monitoring stems from the inherent risks associated with the athletic activity. Injuries are common in middle and high school interscholastic sports: "The National Athletic Trainers' Association (NATA) estimates the injury total to be about 1.3 million per year" for high school football players, basketball players, and wrestlers. Miracle & Rees, *Lessons of the Locker Room* at 110 (footnote omitted). Moreover, instances of young athletes dying from sudden heart failure occur with alarming frequency. *See* William C. Rhoden, "Deaths of Youthful Athletes Raise Questions Over Testing," *New*

York Times, March 14, 1994 at A1, C4 col. 2-3 (the deaths of 133 high school athletes since the 1981-82 school year were " 'non-injury related,' mostly the result of heart problems") (quoting Dr. Fred Mueller)). Indeed, "heart problems are the most common cause of death among high school athletes." *Id.* at C4 col. 2.

In an effort to reduce these risks, state associations, school districts, and individual schools and athletic departments have adopted a wide range of measures aimed at monitoring and preserving the health and well-being of student athletes. The most fundamental and ubiquitous of these measures is the physical examination, which the Vernonia School District, like most other schools in the country, requires its interscholastic athletes to undergo.[18] *See* Pet. App. 94a; Pl. Ex. 2 at 30 ¶ 1 (Vernonia Policy for Interscholastic Eligibility and Competition). The Court has viewed the requirement of a physical examination as indicative of a diminished expectation of privacy with respect to drug testing. *See Skinner*, 489 U.S. at 627; *see also Von Raab*, 489 U.S. at 677 (listing "medical examinations" as one of the "intrusions that may be expected to diminish [employees'] expectations of privacy in respect of a urinalysis test").

Significantly, the physical exam required by Vernonia, and submitted to by James Acton, included the collection and medical analysis of a urine sample. *See* Pet. App.

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[18] The National Federation of State High School Associations recommends a physical examination before the first year of competition and annual parental consent. *See* Rhoden, "Deaths of Youthful Athletes," *New York Times*, March 14, 1994 at C4, col. 5. Sixteen state associations follow this recommendation, while an additional twenty-six state associations require a physical examination prior to each year of competition, as well as annual parental consent. William C. Rhoden, "Athletes At Risk Too Often," *New York Times*, Dec. 11, 1993 at 31. The well-publicized deaths of a number of high school athletes have spawned efforts to require more extensive and frequent physical examinations for interscholastic participation. *See id.*; Rhoden, "Deaths of Youthful Athletes," *New York Times*, March 14, 1994 at C4 col. 4.

94a n.2; J.A. 17-18. The fact that athletes are already required to give a urine sample as part of the physical exam, for reasons unrelated to drug testing, further suggests a diminished expectation of privacy with respect to the drug test itself. *See Schaill,* 864 F.2d at 1318.[19]

To further reduce risk to student athletes, detailed procedures are typically established for injuries and other emergencies, *see* Appenzeller, *Managing Sports* at 104-07, and the safety and well-being of student athletes is monitored on a continuing basis by coaches and, in many cases, team physicians. *See* Irvin A. Keller & Charles E. Forsythe, *Administration of High School Athletics* 293-97 (7th ed. 1984); Appenzeller, *Managing Sports* at 103. For example, athletes are individually fitted with protective equipment containing appropriate warning labels, and this equipment is periodically inspected. *Id.* at 153-54; Keller & Forsythe, *Administration of High School Athletics* at 280-81. In addition, student athletes are required to submit signed parental consent forms which discuss the risks of participation. *See* Pl. Ex. 2 at 30 ¶ 1 (Vernonia Policy for Interscholastic Eligibility and Competition); *see also* note 18, *supra* (annual parental consent required for participation by 42 state associations).

Student athletes are also required to abide by training rules established by the coach as well as policies established by the school. *See generally* Pl. Ex. 2 at 30 (Vernonia Policy for Interscholastic Eligibility and Competition) (listing school policies for interscholastic eligibility and competition, including policies regarding academic performance and class attendance); *id.* at ¶ 8 ("[t]he athlete will comply with the rules of conduct, dress, training

[19] Other features of interscholastic athletic competition also support the view that athletes have a diminished expectation of privacy. For example, as the district court noted, the "locker rooms themselves are open spaces and do not provide a great deal of privacy when students shower and change." Pet. App. 117a-18a; *see also Schaill,* 864 F.2d at 1318 ("[t]here is an element of 'communal undress' inherent in athletic participation, which suggests reduced expectations of privacy").

hours and related matters as may be established for each sport"); *see also* Stuck, *Adolescent Worlds* at 19 ("athletes' off-the-field behavior is traditionally and typically regulated by 'training rules' ") (citation omitted). Even such matters as transportation to and from games are closely regulated. *See* Pl. Ex. 2 at 30 ¶ 6 (Vernonia Policy for Interscholastic Eligibility and Competition).

Moreover, athletics as a whole has been pervasively regulated to prevent individual athletes from gaining an unfair advantage. For decades, drug testing has been conducted in athletics to deter and detect the use of performance-enhancing drugs. *See generally* Eric D. Zemper, *Drug Testing in Athletics, in* Coombs & West, *Drug Testing* 113; *see also Schaill,* 864 F.2d at 1319 (discussing "high visibility and pervasiveness of drug testing in professional and collegiate athletics in this country and in the Olympic Games").

3. *The Setting, Procedure, Purpose, And Consequences Of The Test Minimize Intrusion*

In addition, a number of other features of the Vernonia testing program serve to minimize its intrusion. First, the test is conducted in a school setting, a setting in which students typically feel comfortable. *Cf.* Walker, *Children's Health Care and the Schools, in* Schlesinger & Eisenberg, *Children in a Changing Health System* at 266 ("[S]chools can more effectively address some health needs of children and youth because they provide environments in which students feel comfortable. Schools are a better and less intimidating environment than physician offices or hospitals for offering health education and counseling."); *T.L.O.*, 469 U.S. at 348-50 (Powell, J., concurring) (discussing cooperative nature of the teacher-student relationship).

In addition, students are advised of the details of the testing program prior to their participation in interscholastic athletics. *See* J.A. 7-11 (Student Athlete Drug Policy). Such advance notice reduces anxiety and "signifi-

cantly diminishes the subjective intrusiveness" associated with the testing process. *Schaill*, 864 F.2d at 1320; *cf. United States v. Biswell*, 406 U.S. 311, 316 (1972); *New York v. Burger*, 482 U.S. 691, 711 (1987). While the random testing program does not permit a given student to know in advance the days on which he will be tested,[20] or the number of times during the season he will be tested,[21] he is advised of the procedures for random selection, which are routinized and discretionless. *See* J.A. 8 (Student Athlete Drug Policy); Pet. App. 36a-37a; *id.* at 88a-89a.[22]

The School District's procedure for the collection of urine samples does not materially differ from the procedures approved by this Court in *Skinner* and *Von Raab*, and by the Seventh Circuit in *Schaill*. Here, as in those cases, the monitor does not view the act of urination, nor is the student's body exposed to the monitor. *See* Pet. App. 89a-90a; J.A. 28 (testimony of Ralph Aultman). The monitor is seated 12 to 15 feet away while the sample

[20] The unpredictability of test dates is itself essential to the integrity of the testing program. *See* Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Coombs & West, *Drug Testing* at 204-05, 207 (discussing the various techniques used to thwart drug testing programs with predictable test dates); *cf. Burger*, 482 U.S. at 710 ("Because stolen cars and parts often pass quickly through an automobile junkyard, 'frequent,' and 'unannounced' inspections are necessary in order to detect them. In sum, surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.").

[21] The fact that a given student may be randomly selected many times during the school year, or may be tested only at the outset of the season, does not detract from the program's validity. The Court rejected an analogous argument in *Burger*. *See* 482 U.S. at 711 n.21.

[22] No dispute has been raised concerning the fairness of the process for random testing. *See* Pet. App. 36a. In addition, because the samples are screened only for a discrete set of substances, *see* Pet. App. 122a, no issue concerning additional medical or personal facts that might be learned from the urine sample is presented.

is produced, and the monitor checks the temperature of the sample after it is collected. Pet. App. 90a. While the collection of urine samples is therefore subject to limited monitoring to prevent tampering or substitution of another person's urine, *see* Coombs, *Drug Testing As Experienced By Mandatory Participants, in* Coombs & West, *Drug Testing* at 204, the intrusion is minimized.

Finally, the intrusion is minimized by the fact that the consequences of refusing or failing a drug test are nonpunitive. Positive test results "are not disclosed to criminal authorities and may not be used as the basis for school disciplinary proceedings such as suspension or expulsions." Pet. App. 121a-22a. The sole impact of refusing or failing the drug test is on a student's eligibility to participate in interscholastic athletics, a purely voluntary extracurricular activity which, as discussed above, is already pervasively regulated.[23]

C. The Compelling Interests Served By The Program Far Outweigh The Intrusion On Fourth Amendment Interests

When the compelling interests served by the drug testing program are balanced against the intrusion the testing requires, it is clear that the testing is not an "unreasonable search or seizure" under the Fourth Amendment. The court of appeals' contrary conclusion is attributable in part to its failure to recognize factors present in this case

[23] *See Schaill*, 864 F.2d at 1319 & n.11. The court of appeals attempts to underplay the voluntary nature of interscholastic athletics by referencing the developmental and educational benefits of physical activity. Pet. App. 55a-56a. But the School District offers all of its students these benefits through its physical education program, which is provided as part of the regular curriculum and for which no drug test is required. While it may be true that interscholastic athletics are "part of what tax dollars pay for," *id.* at 55a, this does not mean that students participate in interscholastic athletics as of right. Student athletes are subject to a wide range of training rules and school policies, and may be excluded from participation for noncompliance. *See Schaill*, 864 F.2d at 1318-19 & n.9 (collecting cases).

which diminish the degree of intrusion and its disregard of the fact that students who choose to participate in interscholastic sports are subject to pervasive regulation associated with that activity which diminishes their expectation of privacy.

Perhaps most important to the court of appeals' conclusion, however, was its erroneous view that suspicionless testing may only be implemented where there is a risk of a dramatic, discrete mass disaster. The court of appeals indicated that such testing could be justified only by "some additional horrible element, some terrible threat to safety that can flow from the presence of drugs—some shooting, some explosion, some crash of train, truck, or aircraft, or some breach of top secret national security." Pet. App. 58a.

This analysis is flawed for two reasons. First, it ignores the very severe risks that can and do flow from drug use by athletes. Sudden death and severe injury are all too common occurrences in middle school and high school athletics, *see* pp. 20-21, *supra*, and the presence of drugs substantially increases the risk of such events occurring. *See* pp. 11-13, *supra*. This, *amici* submit, should unquestionably qualify as a "terrible threat to safety" under the court of appeals' approach.

Second, and more fundamentally, the court of appeals' approach fails to recognize that it is not only the *magnitude* of a threatened harm that is relevant to the balancing test, but also the *probability* of that harm occurring, absent government action.[24] For example, a very low prob-

[24] Consideration of the probability of a harm's occurrence, as well as the severity of the harm, has been incorporated into reasonableness inquiries in a number of contexts, most notably by Judge Learned Hand. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (whether a defendant has acted reasonably depends both on the gravity of the injury and the probability of its occurrence); *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) (Hand, J.) ("In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary

ability of a particular harm occurring may be sufficient to justify governmental action where the magnitude of the harm is very great. In *Von Raab*, the Court permitted suspicionless testing on a record which evidenced a relatively low chance of certain potential harms occurring, based on its assessment of the magnitude of those harms. *See* 489 U.S. at 673-75 & n.3.[25]

Here, in contrast, the harms which the School District sought to prevent through its drug testing program—injury to athletes, and a deterioration of school discipline so severe as to make the education of students impossible—were already occurring when the District took action. In this case, there was ample evidence that a substance abuse epidemic of serious proportions existed in the Vernonia schools, that it was particularly concentrated in the interscholastic athletic programs, that discipline had drastically deteriorated, and that drug-related injuries had occurred.

Thus, even if the inability of an entire school to educate and protect its students is viewed as a disaster of lesser dimensions than a shooting or a crash, it is quite significant that the former disaster was already in progress at Vernonia when the School District took action. The Court's opinions should not be read to permit suspicionless testing where a small chance of a somewhat more dramatic disaster exists, and not to permit such testing where a somewhat less dramatic disaster is already underway. To draw such distinctions runs contrary to

to avoid the danger."), *aff'd*, 341 U.S. 494 (1951). The relevance of Hand's analysis to Fourth Amendment reasonableness has been noted. *See* Richard A. Posner, *Economic Analysis of Law* § 29.1 at 640 (3d ed. 1986) (applying Hand formula to Fourth Amendment reasonableness inquiry).

[25] There was no evidence of a drug problem among Customs employees prior to drug testing, and drug testing failed to reveal a drug problem. *See id.* at 673. Moreover, the government had not demonstrated *"even a single instance* in which any of the speculated horribles actually occurred." *Id.* at 683 (Scalia, J., dissenting) (emphasis in original).

the balancing idea that is central to the reasonableness determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
Guardians ad litem for James Acton,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE INSTITUTE FOR A DRUG-FREE WORKPLACE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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Schaill by Kross v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988) 3,13,14

Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602 (1989) 4,11,12,13,14,20

Wilkinson v. Times Mirror Corp., 264 Cal. Rptr. 194 (1st Dist. 1989) 12

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R. Cook, A. Bernstein, and c. Andrews, *Assessing Drug Use in the Workplace: A Comparison of Self-Report, Unrialysis and Hair Analysis*, unpublished paper (1994) 24

D. Crouch, M. Birky, et. al., National Institute on Drug Abuse, *A Critical*

Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs, Drugs in the Workplace: Research and Evaluation Data, 169-93 (1989) 8,25

D. Crouch, M. Birky, et. al., *Prevalence of Drugs and Alcohol in Fatally Injured Truck Drivers*, 38 J. Forensic Sci. 1342-53 (1993) 25

Christopher S. Frings, D.J. Battaglia, and Robert M. White, *Status of Drugs-of-Abuse Testing in Urine Under Blind Conditions: An AACC Study*, Clinical Chemistry, Vol. 35, No.5, 891-894 (1989) 20

Michael Leroy, *Discriminating Characteristics of Union Members' Attitudes Toward Drug Testing in the Workplace*, 12 J. Lab. Res. 453 (1991) 28

Rear Admiral P.J. Malloy, USN (ret.) *Winning the War on Drugs — Check the Military*, The Drug-Free Workplace Report, (Fall 1990) 21,22,28

W.M. Marine, B. Derstine, and T. Jack, Bureau of Labor Statistics, *Analysis of Toxicology Reports from the 1991 Census of Fatal Occupational Injuries* (1991) 25

Dorothy P. Rice, Institute for Health and Aging, University of California at San Francisco (1990) (unpublished data), *in* The Robert Wood Johnson Foundation Report, *Substance Abuse: The Nation's Number One Health Problem* (1993) 6

R.N. Taggart, *Results of the Drug-Testing Program at Southern Pacific Railroad Study*, Drugs in the Workplace: Research and Evaluation Data, NIDA, 97-108 (1989) 22,26

Michael Verespej, *Drug Users — Not Testing — Anger Workers: Resistance to Workplace Testing May be a Thing of the Past*, Industry Week, February 17, 1992, at 33 28

Almost Half of U.S. Companies Will Require Drug Tests of College Grads This Year, Daily Labor Report, May 9, 1990 11,23

American Management Association Survey, *Workplace Drug-Testing and Drug Abuse Policies* (1993) 7,11,21,23

The Business Roundtable, *Corporate Membership Surveys*, New York, New York (1983, 1991) 17

Equifax, Inc. 1990. Daily Labor Report, June 12, 1990, at A-14 28

Federal Highway Administration, U.S. Dept. of Transportation, *Random Roadside Testing Pilot Program* (1993) 25

Institute for a Drug-Free Workplace, *Does Drug Testing Work?*, (1994) 7,21,22

National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992) 22

National Institute of Justice, U.S. Department of Justice, *1991 Drug Use Forecasting Annual Report*, 21 (1993) 5

Personnel Research and Development Branch, Office of Selection and Evaluation, United States Postal Service, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (1992) 8

SmithKline Beecham, *SmithKline Beecham Drug Testing Index — Trend and Rate Charts* (October 12, 1993) 6

Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *National Household Survey on Drug Abuse: Population Estimates 1992* (1993) 5

Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1992 National Household Survey on Drug Abuse.* Advance Report Number 3 (June 1993) 7,25

Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse* (July 1994) 5,6

Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1989) 6,27,29

Survey of 807 Georgia Employees, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1994) 27

Survey of 500 Massachusetts Employees, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1991) 27

Survey of 411 Pennsylvania Employees, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1994) 27

Survey of 500 Texas Employees, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1990) 27

U.S. Department of Health and Human Services, *Monitoring the Future Survey* (1994) 5,9

Interest of *Amicus Curiae*

The Institute For a Drug-Free Workplace (the "Institute") is a non-profit coalition of private businesses and business organizations dedicated to preserving the interests of employers and employees in effective and responsible drug-abuse prevention programs.

Among other functions, the Institute disseminates information intended to positively influence the national, state, and local consideration of drug-abuse prevention issues and to assist corporate drug-abuse prevention and treatment programs.

The Institute also has extensive resources and collects and disseminates information pertaining to drug testing and to drug-abuse prevention programs. Most of the Institute's data on drug testing deals with employees in the private sector. However, because employees have been commonly tested and the results have been extensively analyzed, the employee drug-testing experience is highly relevant to other segments of American society as well, including those in educational and athletic settings that will be considered by the Court in this case.

The relevance of the Institute's positions to the case presently before the Court, which deals with urinalysis drug testing of student-athletes in a public school system, is further established because the Institute, its members, and the business community as a whole have an inherent interest in promoting drug-abuse deterrence and detection in schools. Students are the future — and frequently the current — employees of America. There is a great deal of corporate effort and financial support being directed to quality of education and work force preparation issues, and certainly the impact of substance abuse and the magnitude of the

problem in our schools are direct and legitimate employer concerns.

It is therefore obvious that decisions made in educational forums — including the decision made by the Court in this case — will have an impact on the workplace.

The Institute's goal in this brief is to assist the Court in assessing the societal interest in deterring and detecting drug abuse and the intrusion on individual privacy attendant upon urinalysis drug testing. Because the parties will be presenting thorough arguments addressing all aspects of the Fourth Amendment issues raised by this case, the Institute has endeavored to focus on those factual issues that are germane to the Court's analysis but about which the Institute has specific information. Towards this end, the Institute provides statistical evidence from its own and other studies. This *amicus* submits that the evidence supports the use of suspicionless testing of students as a means of deterring drug abuse and identifying individuals in need of assistance.[1]

Summary of the Argument

Drug abuse and its resultant harm are ubiquitous in American society at all levels and in all parts of the country. Because of this fact, the Court should not require a specific showing of a problem and harm for the student-athletes in Petitioner's school system. A compelling need to deter drug abuse should be presumed present rather than presumed absent.

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[1] Petitioner and Respondent have consented to the filing of this brief.

Urinalysis drug testing is an appropriate means of addressing this need. When properly conducted, such testing intrudes only minimally on individuals' privacy expectations. In addition, drug testing provides an effective means of deterrence and detection that cannot be achieved by other methods.

Argument

I. THE WIDESPREAD DAMAGE CAUSED BY DRUG ABUSE SHOULD BE GIVEN SUBSTANTIAL WEIGHT IN CONSIDERING THE NEED FOR DRUG TESTING.

"Drug abuse is one of the most serious problems confronting our society today." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989). The crisis exists for Americans at home, in the workplace[2] and in the schools.[3]

The magnitude of the national drug-abuse epidemic has received judicial recognition. The Court of Appeals for the Seventh Circuit in *Schaill by Kross v. Tippecanoe County Sch. Corp.* cited statistics declaring that 63 percent of high school seniors in Indiana had tried marijuana, and 23 percent of high school seniors across the nation as a whole had used marijuana in the preceding month alone. 864 F.2d 1309,

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[2] *See, National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989).

[3] The U.S. Supreme Court in *New Jersey v. T.L.O.* described drug abuse among students as one of the "particularly ugly forms" in which school disciplinary problems commonly arise in present-day America. 469 U.S. 325, 339 (1985).

1320 (7th Cir. 1988). Other courts have recognized the important role that schools should play in deterring and detecting drug abuse as well.[4]

Furthermore, our nation's drug-abuse problem is getting worse — in fact, substantially worse since 1989 when the U.S. Supreme Court last addressed the issue of drug-testing and upheld its use.[5] The Court should not retreat from its position articulated in *Von Raab*. 489 U.S. at 674. Indeed, it should give even greater recognition to the overall harm caused by drug abuse and to the appropriateness of drug testing as a means of addressing the problem. Empirical evidence confirms that drug abuse impacts all segments of society. There are *no* exceptions.

A. The Pervasiveness of Drug Abuse and Its Impact

Drug abuse — when committed by *any* segment of the population — has substantial human and economic costs. These include a direct and causal nexus to loss of life, personal injuries, property damage, loss of productivity, health care costs, and crime.

Nationwide studies of the general population show the prevalence of drug abuse and its devastating impact.

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[4] *See, e.g., Anable v. Ford*, 653 F. Supp. 22, 40 (W.D. Ark. 1985); *Bunger v. Iowa High Sch. Athletic Ass'n.*, 197 N.W.2d 555, 564 (Iowa 1972); and *Braesch v. DePasquale*, 265 N.W.2d 842, 847 (Neb. 1978).

[5] *National Treasury Employees Union v. Von Raab*, 489 U.S. 656; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

According to the U.S. Department of Health and Human Services, illicit drug use decreased every year in the United States from its peak year of 1979 *until* 1993, when the rate of illicit drug use *increased*. An estimated 11.7 million Americans aged 12 and older (equalling 5.6 percent of the population) are current illicit drug users.[6] Furthermore, among students (aged 13-18), illicit drug use has *consistently* increased over the past four years.[7]

The prevalence of drug abuse is the beginning of the problem; its devastating effects are the culmination. Extensive research is not required to find a direct correlation between drug abuse and deaths, personal injuries, property damage, health care costs, and crime. In 1991, at least half of all people arrested for major crimes — including homicide, theft, and assault — were using illicit drugs at the time of their arrest.[8] More than 7,530 deaths were attributed directly to drug abuse in 38 metropolitan areas alone in 1992.[9] The number of deaths and debilitating

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[6] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse* (July 1994).

[7] U.S. Department of Health and Human Services, *Monitoring the Future Survey* (December 1994).

[8] National Institute of Justice, U.S. Department of Justice, *1991 Drug Use Forecasting Annual Report*, 21 (1993).

[9] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *National Household Survey on Drug Abuse: Population Estimates 1992* (1993).

injuries *indirectly* related to drug abuse is substantially higher,[10] making the combined overall cost staggering.[11]

B. Drug Abuse Among Employees and Its Impact

Drug abuse by employees is relevant to the public school environment for three reasons. First, because nearly two-thirds of illicit drug users are employed,[12] the negative

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[10] Hospital emergency department episode statistics show the correlation between drug abuse and physical injuries. Approximately 466,900 hospital emergency department episodes were directly attributed to drugs in 1993. There were 46,800 drug-related emergency department episodes for persons aged 12-17 alone. *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse, supra.*

[11] The combined overall cost of drug abuse to American society was estimated at $67 billion in 1990. This includes the expense of treating substance abuse, the productivity losses caused by premature death and the inability to perform normal activities, and costs related to crime, destruction of property, and other losses. Dorothy P. Rice, Institute for Health and Aging, University of California at San Francisco (unpublished data) (1990), *in* The Robert Wood Johnson Foundation Report, *Substance Abuse: The Nation's Number One Health Problem* (1993).

[12] *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse, supra.* In addition, the latest SmithKline Beecham Drug Testing Index in which 9 million urine samples from the American work force were tested, showed that 8.41 percent of the 1.5 million employees and applicants who were tested for drugs at SmithKline Beecham Laboratories in 1993 tested "positive." SmithKline Beecham, *SmithKline Beecham Drug Testing Index — Trend and Rate Charts* (October 12, 1993).

In addition, 24 percent of full-time employees surveyed by the Gallup Organization said they had "personally seen or heard of" illicit drug use on the job, and 41 percent said that drug use in their workplace "seriously affects their ability to get the job done." *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home* conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey

and often dangerous effects of their drug abuse on themselves and others around them is indicative of the effects experienced by other groups such as students. Second, data on employees offer insights into the actual prevalence of drug abuse and drug-dealing in America as a whole and in diverse and widespread individual communities.[13] Third, it provides conclusive evidence on the effectiveness of drug testing as a deterrent.[14]

Approximately 11 percent of the work force abuses drugs or alcohol.[15] Drug abusers in the workplace are much more likely to cause accidents and have higher absenteeism rates, and above-average medical claims. One study, for example, showed that the U.S. Postal Service would have saved $52 million by 1989 had it screened out all drug-"positive" postal service applicants who were hired in 1987. Furthermore, after 2.4 and 3.3 years, employees who had tested "positive" were involuntarily dismissed at rates of 69.4 percent and 77.4 percent more often than "negative" testers, respectively. In addition, employees testing "positive" on preemployment drug tests were 59.4 percent more likely to be heavy users of leave in the first 1.3

(1989).

[13] A recent corporate survey reported that 85 percent of companies use drug testing. American Management Association, *Workplace Drug-Testing and Drug Abuse Policies* (1993).

[14] *See* Institute for a Drug-Free Workplace, *Does Drug Testing Work?* (1994) (summarizing over 40 major research studies and 39 corporate case studies).

[15] Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, *1992 National Household Survey on Drug Abuse*. Advance Report Number 3 (June 1993).

years. After 2.4 years of employment, "positive" testers were absent for almost 10 percent of the total work hours scheduled.[16]

A Utah Power & Light case study showed that employees testing "positive" on preemployment drug tests, and who were subsequently hired, were five times more likely to be involved in a workplace accident than those who tested "negative." In addition, employees who tested "positive" on their preemployment drug tests were 1.7 times more likely than those testing "negative" to file above-average medical claims. Employees testing "positive" on their preemployment drug tests were 77 percent more likely to be fired in the first three years of employment, and were absent from work 66 percent more often than those who tested "negative."[17]

C. Drug Abuse Among Students and Its Impact

Drug abuse in schools presents an equally severe problem. Recent national statistics show that more than a third of all eighth graders, 40 percent of all 10th graders, and nearly 50 percent of all 12th graders have used illicit

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[16] Personnel Research and Development Branch, Office of Selection and Evaluation, United States Postal Service, *Preemployment Drug Testing: Associations with EAP, Disciplinary, and Medical Claims Information* (1992).

[17] Dennis Crouch, M. Birky, et. al., National Institute on Drug Abuse, *A Critical Evaluation of the Utah Power and Light Company's Substance-Abuse Management Program: Absenteeism, Accidents, and Costs*, Drugs in the Workplace: Research and Evaluation Data, 169-93 (1989).

drugs.[18] Furthermore, there is substantial evidence in the record that the Vernonia School District specifically faced a compelling drug-abuse problem among its student-athletes.

However, even if the evidence does not convince the Court that a serious problem existed in Vernonia, the Court should recognize drug abuse's overall impact on students across the country. It is unreasonable to require every school district, employer, or organization interested in using drug testing to conduct an in-depth study when *all* large-scale data demonstrate that a drug-abuse problem exists universally in America.[19] There is no basis on which to distinguish Vernonia from the rest of the United States. Therefore, a school system's administrator should be allowed to presume that drug abuse is a problem absent evidence to the contrary.[20]

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[18] U.S. Department of Health and Human Services, *Monitoring the Future Survey*, *supra*.

[19] As more and more data become available, and as society becomes more aware of the magnitude of the drug-abuse problem and its pervasiveness across America, specialized research as to the precise nature and existence of a particular problem, as would be required under some earlier lower court rulings, is rendered unnecessary and inappropriate. *(See, e.g., Brooks v. E. Chambers Consol. Ind. Sch. Dist.*, 730 F.Supp. 759 (S.D. Tex. 1989); *Derdeyn v. Univ. of Colo.*, 832 P.2d 1031 (Colo. App. 1991)). At some point, the preponderance of empirical evidence becomes so pervasive that assertions become facts. The existence of a major drug-abuse problem in our country has reached that level in 1995: it is a fact.

[20] The problem in schools is only getting worse. In 1992, 14 percent of 12th graders used illicit drugs in the last month. By 1994, the figure had increased to 21.9 percent of 12th graders. *Monitoring the Future Survey*, *supra*.

Once it is determined that drug abuse is prevalent, the harm associated necessarily follows. In the school setting, this harm undoubtedly includes the costs documented in the workplace, such as more accidents, absenteeism, and higher medical costs. It also includes the cost of inefficiency in teaching and learning due to disciplinary problems.

Drug dealing in America's schools — and the increasing problem of violence which is so associated with it — further compromise the educational system. When such illegal behavior is introduced and allowed to proliferate, it is a compelling and legitimate concern of school administrators, faculty, students, and parents.

The severe harm that drug abuse repeatedly has been proven to cause in the general work force, armed services, criminal and law enforcement, and student populations demonstrates that every school system has an interest in preventing drug abuse in its student population, and indeed, may have a responsibility to do so.

II. THE INTRUSION ON INDIVIDUAL PRIVACY OF PROPERLY CONDUCTED URINALYSIS DRUG TESTING IS MINIMAL.

A. Urinalysis Drug Testing and Privacy in the Act of Urination

Correctly established procedures minimize the intrusion on privacy in the act of providing a urine sample. The Institute has always fully acknowledged, as it must, that there exists a legitimate expectation of privacy as to the act

of urination.[21] However, the Institute submits that the intrusion on privacy occasioned by urinalysis is insignificant. In *Skinner*, the Court found that the intrusion on privacy in taking a blood test was insignificant because blood tests had become so commonplace in American society and involved virtually no risk, trauma, or pain. 408 U.S. at 625. The same principle applies to urinalysis. More than 47 percent of businesses interviewing college graduates in 1990 required drug tests before hiring.[22] The percentage is even higher in many "blue-collar" jobs that do not necessarily require a college degree, and which are considered safety-sensitive, such as most positions in the construction, trucking, petrochemical, mining, and shipping industries, and many jobs in the utilities and manufacturing sectors.

Furthermore, since 1989 when the Court decided *Skinner* and *Von Raab*, the number of companies that conduct periodic or random drug testing has increased tenfold.[23] Thus, today virtually every person entering the private work force knows or should know that he or she is likely to be subject to a drug test. Therefore, under the

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[21] "Company drug-abuse prevention programs should be implemented in a fair, consistent, and equitable manner with due consideration of the rights, responsibilities, and privacy interests of all concerned parties." Institute for a Drug-Free Workplace Mission Statement, as approved by its Board of Directors, and adopted by the Institute in 1989. Of course, the Court has specifically acknowledged this point: "The collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617 (1989).

[22] *Almost Half of U.S. Companies Will Require Drug Testing of College Grads This Year*, Daily Labor Report, May 9, 1990, at A-5.

[23] American Management Association Survey, *Workplace Drug-Testing and Drug Abuse Policies*, *supra*.

logic in *Skinner* regarding blood tests, the Court should find that the intrusion on privacy occasioned by urinalysis drug testing is likewise minimal. This conclusion is reinforced by the urinalysis procedural safeguards commonly in use that further minimize the intrusion of urinalysis *and* protect individuals' rights.[24]

The procedures developed by the U.S. Department of Health and Human Services, endorsed legislatively by the U.S. Congress, and commonly in use by the employer community, minimize the intrusion and serve as a guide for optimal urine collection procedures.[25] Two features of optimal procedures are particularly relevant to minimizing the intrusion on privacy in the act of urination.

First, sample collection may be conducted by independent trained professionals at an independent site. This limits the intrusion by likening the test to a medical examination, an environment in which individuals are

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[24] *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672, n.2; *International Brotherhood Teamsters v. Dept. of Transportation*, 932 F.2d 1292, 1299 (1991); *Wilkinson v. Times Mirror Corp.*, 264 Cal. Rptr. 194 (1st Dist. 1989) (no violation of California constitutional right of privacy where procedures were designed to minimize the intrusion).

[25] Optimal procedures should include the following provisions: (1) a secure collection site, (2) a private enclosure for urination, (3) direct observation limited to narrowly defined circumstances where the monitor may reasonably suspect the integrity of the specimen collection, (4) supervision by a licensed medical professional or an individual specifically trained in specimen collection, (5) rigorous chain-of-custody procedures, (6) use of a certified laboratory, (7) confirmatory assays for "positives," (8) use of a Medical Review Officer, (9) maintenance of strict confidentiality, and (10) referral to rehabilitation if a drug-test result is "positive."

accustomed to providing urine for analysis.[26] It has the additional advantage that the individual providing the specimen does not know, and is not known by, the technician collecting the sample.

Second, direct observation of the providing of the sample occurs only when reason exists to question the sample's integrity.[27] This procedure avoids unnecessary intrusions on privacy that courts have, in the past, prohibited.[28] Aural monitoring, in combination with other safeguards against adulteration may be used instead.[29] These procedures reduce the intrusion to an acceptable minimum since the expectation of privacy in the sound of urination is minimal outside the privacy of one's own home.

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[26] *Skinner*, 489 U.S. at 626-627.

[27] At least one court has found that monitoring urine testing to preserve the integrity of the sample does not constitute an unreasonable invasion of privacy. *O'Halloran v. Univ. of Wash.*, 679 F. Supp. 997 (W.D. Wash 1988), *rev'd on other grounds*, 865 F.2d 375 (7th Cir. 1988) (monitored testing of a college athlete to preserve the integrity of the urine sample is not an unconstitutional invasion of privacy).

[28] An example of an unnecessary invasion of privacy is found in *Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985) (requiring a female student to disrobe entirely from the waist down and openly urinate into a tube while a school official of the same sex directly watched).

[29] Other adulteration safeguards include requiring removal of bulky outer garments such as a coat, prohibiting test subjects from bringing personal items such as purses and brief cases into the collection site, placing a bluing agent in the toilet water to guard against dilution, and using temperature strips on specimen containers to assure that the specimen temperature matches normal body temperature. Several courts have recognized the legitimacy of these procedures. *Schaill*, 964 F.2d at 1318; *Von Raab*, 489 U.S. at 672, n.2; *Skinner*, 489 U.S. at 626.

This is particularly true of athletes who, in most instances, share a bathroom with all other team members.[30]

B. Urinalysis Drug Testing and Privacy in Information Obtainable From Urine

Appropriate drug-testing procedures also minimize the potential for intrusion on privacy of information obtainable from urine. There exists a legitimate expectation of privacy as to the information that can be obtained from urine.[31] Analysis of urine can reveal pregnancy, epilepsy, and diabetes, as well as other legitimately personal and private medical conditions.[32] In urinalysis drug testing, therefore, the information taken from the urine sample should be narrowly prescribed so as not to reveal any additional

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[30] Two circuit courts have gone beyond finding a diminished expectation of privacy as to the sounds of urination and have found that athletes have an *overall* diminished expectation of privacy. In *Schaill*, the court found that the high school athletes' expectation of privacy was diminished because they were already subject to medical examinations and were part of a highly regulated group. 864 F.2d at 1317-1318, *citing Von Raab*, 489 U.S. at 678 (finding a diminished expectation of privacy if the group is already subjected to tests invading on privacy) and *Skinner*, 489 U.S. at 627 (finding that persons, such as railway employees, in a highly regulated industry, such as railroads, have a diminished expectation of privacy). The Ninth Circuit cited with approval *Schaill's* finding of diminished expectation of athletes in *International Brotherhood of Teamsters*, 932 F.2d at 1302.

[31] *Skinner*, 489 U.S. at 617 ("It is not disputed that chemical analysis of urine... can reveal a host of private medical facts about an employee."); *Id.* at 625 (breath tests are less intrusive because they reveal no other facts that a person is concerned about); *Von Raab*, 489 U.S. at 671. ("Interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances.")

[32] *Skinner*, 489 U.S. at 617.

medical facts. In this regard, the procedures surrounding urinalysis have been highly regulated and refined by various Federal agencies (in some cases at the direction of the U.S. Congress), the employer community, the medical profession, laboratories and their certifying organizations, and state legislatures and regulatory agencies.

This intense level of scrutiny and regulation has led to procedures that prevent access to information in urine which should not be divulged, thereby minimizing the privacy intrusion.[33]

In addition to the effectiveness of these procedures in limiting information taken from the urine, the potential tort and contract liability for improper disclosure or taking of medical information provide further checks and balances, thereby assuring to the person providing the sample that his or her privacy interests will be honored. For these additional reasons, the risk of a privacy intrusion with respect to the information contained in the sample is minimal.

C. The Increased Use and Acceptance of Urinalysis Drug Testing in Private Sector Employment Has Reduced the Societal Expectation of Privacy Relative to Providing a Urine Specimen.

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[33] The courts have recognized that the procedural safeguards commonly in use minimize the intrusion and protect individual rights. *See*, *supra*, n. 20. For example, strict chain-of-custody procedures prevent the sample from being diverted and tested for conditions other than the presence of illegal drugs. Additionally, the use of an independent laboratory prevents the institution requiring the test from exerting influence over the tester to extract inappropriate information.

"Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property or to understandings that are recognized and permitted by society." *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978). Moreover, the Fourth Amendment's protection do not extend to an individual's subjective expectation of privacy, but only to an "expectation that society is prepared to recognize as 'reasonable'." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Oliver v. United States*, 466 U.S. 170, 177 (1984).

In considering whether a specific expectation is reasonable, the Court, therefore, must examine the societal respect accorded that expectation. Technological advances create new avenues for intrusion upon expectations of privacy, as well as new vehicles for protecting such expectations. Testing of blood, hair, or tissue samples for DNA is being used to provide evidence in connection with criminal prosecutions — and defenses. Donated blood is routinely tested for presence of HIV; however, new products and procedures for the handling of blood and for activities where exposure to blood is possible make it reasonable to protect an individual's desire to keep confidential his or her HIV+ status in many situations.

A central issue in this case is: What is society's expectation with respect to the privacy interest to be accorded urine sample collection for drug testing? Testing for drug metabolites is, from a Constitutional perspective, a new phenomenon. Widespread use within American society of highly accurate urinalysis technologies for drug testing is a development of the last decade. In 1983, only three percent of the Fortune 200 companies conducted drug testing

of one or more classes of job applicants or employees. By 1991, this percentage had risen to 98 percent.[34]

In other words, among the country's largest employers, the procedure had gone from virtually unknown to nearly universal. The societal expectation, therefore, is that, in the workplace context, everyone will be tested at some point for drugs. Furthermore, the overwhelming majority of tests are conducted using urine, which is collected from the individual to be tested using procedures that generally conform to those used by Petitioner.

The Institute urges the Court to consider both the current societal expectation of privacy with respect to urine collection for drug testing and the trend in that expectation, which is decisively away from greater protection. The reduced sense of intrusion occasioned by urinalysis procedures is a composite, reflecting the increased use of analytic medical procedures generally for a variety of purposes, public concern over the drug crisis nationally, widespread institution of drug testing by private entities where no "search and seizure" constraints exist, and the use of highly accurate, verifiable tests combined with non-discretionary and frequently regulated procedures to protect individuals' privacy rights. The expectation that urination will be a private function may still be the norm. However, collection of a urine specimen for drug testing under now

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[34] The Business Roundtable, *Corporate Membership Surveys*, New York, New York (1983, 1991).

standardized conditions is, from a societal standpoint, viewed as a minimal intrusion on individual privacy.[35]

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[35] In addition, suspicionless administrative searches — such as those drug tests conducted according to the policy of the Vernonia School District — are in some ways less intrusive than "cause"-based searches. A significant problem created by drug testing is the implication that if an individual is selected to take a test, he or she "must have a drug problem." This issue arises frequently in employment-related situations where, for example, a truck driver must be removed from his position pending the results of a drug test, which can take several days to obtain. In the meantime, other employees are frequently aware that the individual is not working. Even if the employee is on paid administrative leave and the reason for the leave is kept confidential, co-workers will often surmise why their colleague is not on the job. Identical inferences will and do occur in the school setting. The result is that tested individuals will frequently complain that being sent for a drug test is defamatory or places them in a false light, even if they ultimately "pass" the test itself.

The "suspicionless" test absolutely and completely avoids this significant problem. Both universal initial screening (such as preemployment testing) and random testing have this feature. An individual sent for a test because a random-identification system selected that person's name carries with it no onerous inferences.

Furthermore, such a system has the advantage of entirely eliminating the highly subjective determination of probable or reasonable cause testing. Visual observations by teachers, administrators, or coaches are subject to both disparate interpretation and outright abuse. (Would it be too much to expect that a teacher with a problem student might find it necessary to send the student for a test based on his "behavior"? How would school officials take into account special education students who are emotionally disturbed and require medication, yet whose medical conditions are statutorily confidential?) Suspicionless testing does not solve the problem of determining when to send a person for drug testing based on individualized suspicion of impairment. The important point is that suspicionless testing itself does not raise — and completely avoids — certain concerns inherent in "for cause" testing. Since the purposes of the testing are deterring drug use and identification of young people in need of help, and not for referral for criminal prosecution, these dual features of objective criteria and lack of opprobrium for selection should weigh very heavily in

III. IN ADDITION TO BEING MINIMALLY INTRUSIVE, URINALYSIS IS AN EFFECTIVE, ACCURATE, AND WIDELY ACCEPTED MEANS OF DETERRING DRUG ABUSE AND IDENTIFYING INDIVIDUALS IN NEED OF DRUG REHABILITATION.

A common argument against urinalysis drug testing is that less intrusive methods are available to deter and detect drug abuse. Although other methods of drug-abuse prevention such as visual observation, self-reporting, and drug education and awareness programs are available, alone they are insufficient in deterring and detecting drug abuse or in identifying individuals in need of rehabilitation or treatment. Drug testing, in combination with these and other measures, adds a level of effectiveness that is absolutely necessary in many settings to combat drug abuse.

A. Urinalysis Drug-Testing Programs Effectively Deter Drug Abuse.

Urinalysis drug testing effectively deters and detects drug abuse. Urinalysis has a high detection rate, detecting virtually all individuals who have proximately engaged in illicit drug use, including those who are "in denial."[36] Urinalysis is also highly accurate and virtually *never* produces "false positives," and very seldom produces "false negatives" (which are, of course, of much less concern than

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favor of Petitioner's drug-testing policy.

[36] Individuals with a substance abuse problem frequently deny that the problem exists. For this reason, it is often futile to expect such individuals to submit themselves voluntarily to rehabilitation, to seek help on their own, or to recognize the damages they pose to themselves and others.

"false positives"), when conducted with a confirmatory test and reviewed by a Medical Review Officer.[37]

This combination of a high detection rate *and* a high accuracy level creates certainty for those engaged in illicit drug use that their use will be detected. Millions of Americans do not feel they will be caught by their employer, or the police, or that their substance abuse will cause harm or injury to themselves or others. Therefore, they perceive no downside risk to engaging in illicit drug use when no drug-testing program is in place. However, the business community recognizes that millions of Americans have stopped illicit drug use because of workplace drug testing and this, in fact, has been the experience of thousands of employers, including virtually all Institute members. Urinalysis increases the risk of loss of employment for employees, or denial of employment for job applicants, to a greater level and thus makes the downside risks of illicit drug use unacceptable to millions of Americans.[38]

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[37] The accuracy of urinalysis was noted in *Von Raab*, 489 U.S. at 672, n.2, and is supported by empirical studies. In 31 laboratories across the United States, 1,486 samples were tested for the presence of marijuana, amphetamines, cocaine, opiates and phencyclidine (PCP). Of the 1,486 trials conducted, there were no "false-positive" test results. Due to 45 "false negatives", the overall accuracy rate of urinalysis was 97 percent. Christopher S. Frings, Danielle J. Battaglia, and Robert M. White, *Status of Drugs-of-Abuse Testing in Urine Under Blind Conditions: An AACC Study*, Clinical Chemistry, Vol. 35, No.5, 891-894 (1989).

[38] Contrary to the dissenting opinions in *Von Raab*, 489 U.S. at 683, and *Skinner*, 489 U.S. at 634, empirical studies prove that drug users view testing as a more powerful deterrent than concern over their own welfare, or safety, or that of other persons. A 1987 study by the U.S. Navy found that 87 percent of personnel said random testing was the Navy's strongest deterrent to drug abuse. More than 27 percent said that they would resume their use of illicit drugs if the Navy discontinued its drug-testing program. Rear Admiral

Urinalysis drug testing therefore creates a credible and effective deterrent. The "fear of being caught" — and the attendant higher level of accountability — are effective deterrents to student-athletes in the scholastic setting as well.

The deterrent effect of urinalysis drug testing is supported by various empirical studies and by the dramatic increase in urinalysis programs in the past few years. In virtually every situation where urinalysis drug testing has been implemented, drug abuse and the harm associated with drug abuse has decreased, including the Vernonia School District.[39] Nationally, the overall decrease in drug abuse in America corresponds with the dramatic increase in urinalysis drug-testing programs.[40] While greater awareness of the damage of drug abuse also is undoubtedly a major factor in the decline in drug abuse, the number one factor is the widespread employer implementation of substance-abuse prevention programs, especially those including drug testing as a vital component. Specifically documented decreases are found in declining "positive" test

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P.J. Malloy, USN (Ret.), *Winning the War on Drugs — Check the Military*, The Drug-Free Workplace Report, Fall 1990, at 4.

[39] "Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented." *Acton v. Vernonia Sch. Dist. 47J*, 23 F.2d 1514, 1524 (9th Cir. 1994). *See also*, Institute for a Drug-Free Workplace, *Does Drug Testing Work?*, 61-102 (1994) (summary of 39 corporate case studies showing the deterrent effect of drug testing).

[40] Approximately 15 million Americans were tested for drugs in 1993, up from about seven million in 1987. *Does Drug Testing Work?*, *supra*, at 29. Random drug testing alone has increased 1,200 percent since 1987. American Management Association Survey, *supra*.

rates among the group tested,[41] declines in the number of drug-related accidents,[42] and declines in other costs and negative effects of drug abuse.[43] Finally, the increase in drug testing alone indicates its effectiveness, as employers and other institutions would only implement and pay the

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[41] In 1980, a survey of Navy enlisted personnel revealed that 48 percent had used illegal drugs in the month preceding the survey. One year later, after initiating a universal random drug-testing program, the survey findings were confirmed — 48 percent of those tested were "positive" for drugs. By 1988, however, that number decreased to less than five percent. *Winning the War on Drugs — Check the Military*, *supra*, at 4. Similar results were found in corporate studies by Occidental Chemical, Emergency One, Brown & Root, and Chicago Northwestern Transportation Company, among many others. *See Does Drug Testing Work?*, *supra*, at 61-102.

[42] Two studies typify the decreases in accidents that accompany a drug-testing program. The Construction Industry Survey on Substance Abuse (1992) found that in companies where substance-abuse testing was implemented, there was an overall 40 percent decline in substance-abuse-related incidents. The study also showed an overall decline in workplace accidents of 34 percent. National Association of Plumbing-Heating-Cooling Contractors, *The Construction Industry Survey on Substance Abuse* (April 1992). Another example is provided by Southern Pacific Railroad. After implementation of a drug-testing program, between 1984 and 1988, injuries decreased 71 percent. Train accidents due to human failure also decreased by 88 percent. R.N. Taggart, *Results of the Drug-Testing Program at Southern Pacific Railroad Study*, Drugs in the Workplace: Research and Evaluation Data, NIDA, 97-108 (1989). For other similar findings, *see generally*, *Does Drug Testing Work?*, *supra*, 61-102.

[43] Upjohn Company provides an example of the typical decreased costs associated with drug abuse when a drug-abuse prevention program is implemented. The gross savings due to the drug-abuse prevention program were calculated at more than $1 million in 1993. Reduced absenteeism and reduced turnover were responsible for savings of $450,000 and $349,000, respectively. *Does Drug Testing Work?*, *supra*, at 100. For other examples, *see Does Drug Testing Work?*, 61-102.

substantial cost of a program that had been proven effective.[44]

B. Less Intrusive Methods of Deterrence and Detection of Drug Abuse Often Are Not Sufficiently Effective.

Less intrusive methods of deterrence and detection of drug abuse, such as visual observation, self-referral, and drug education and awareness programs, are not as effective as urinalysis drug testing and often do not sufficiently deter and detect drug abuse. Every alternative method that does not involve a form of chemical testing has shortcomings that limit the percentage of drug abusers that are deterred from use or detected.

The primary shortcomings of visual observation are its limited detection rate and its inherent subjectivity and inaccuracy. Visual observation alone cannot detect all, or even a substantial portion of, drug-impaired individuals. Often individuals are either not adequately supervised to be

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[44] The increase in the number of drug-testing programs in place is confirmed by several studies. For instance, the Workplace Drug-Testing Programs American Management Association Survey (1993) reported that a record 85 percent of companies were conducting drug testing — a 14 percent overall increase since 1991. American Management Association Survey, *supra*. Similarly, a survey of employers interviewing at Michigan State University in 1990 reported that of the 479 businesses it surveyed, 47 percent require new college graduates to pass a drug test before being hired; up from 32 percent in 1989. Furthermore, among companies that were not currently requiring testing, nine percent planned to initiate such a program within a year and 11 percent within two years. *Almost Half of U.S. Companies Will Require Drug Tests of College Grads This Year*, Daily Labor Report, May 1990, at A-5.

noticed when impaired or are able to avoid detection by hiding their impairment from others.[45] Because of these lower detection rates, individuals do not fear being caught and are not deterred from use. Visual observation is also inherently inaccurate because observers are not always adequately trained or qualified to make assessments of impairment. This results in both false allegations of impairment and false assessments of fitness, again decreasing the deterrence value and detection rate of visual observation.

The most significant shortcoming of self-referral programs is that they do not detect drug abusers who deny that they have a problem. Drug-dependent individuals frequently do not recognize, and/or often are in psychological denial regarding their dependency. The ineffectiveness of self-referral programs compared to chemical analysis programs has been documented in the workplace and prison settings.[47] In fact, in the workplace, self-referral detects at *most* half as many drug abusers as does chemical analysis in combination with education.[48]

Finally, drug education and awareness programs often do not prevent drug abuse because drug abusers commonly believe that they can function safely and adequately even

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[45] Obviously, the fact that many individuals are able to conceal their drug abuse does not mean that they are able to function safely.

[47] *See generally*, R. Cook, A. Bernstein, and C. Andrews, *Assessing Drug Use in The Workplace:A Comparison of Self-Report, Urinalysis and Hair Analysis*, unpublished paper (1994).

[48] The actual drug use prevalence in the workplace is likely to be approximately 50 percent higher than the estimate based on self-reports. It may be even higher because some subjects refused to take part in this study. *Assessing Drug Use in the Workplace*, *supra*, at 18.

after proximately engaging in substance abuse.[49] Thus, despite educational efforts, fear of causing an accident or harm to themselves or others does not sufficiently deter drug abusers from using drugs even in dangerous situations. This is evident in statistics on highway fatalities,[50] and in statistics on workplace injuries.[51]

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[49] This belief is reflected in the number of drug abusers who admit to using drugs on the job. According to unpublished data from the 1991 National Household Survey on Drug Abuse, 15 percent of drug users and six percent of heavy alcohol users responded that they had been high or drunk on the job in the last year. For workers who entered treatment programs, two-out-of-five reported working under the influence at least once a week prior to treatment. *Preliminary Estimates from the 1991 National Household Survey on Drug Abuse*. Advance Report No. 3, *supra*. Additionally, a 1987 survey of individuals who called the National Cocaine Helpline seeking help in regard to their drug problem revealed that 75 percent had used drugs on the job. National Cocaine Helpline, *800-COCAINE* (1987).

[50] Of truck drivers fatally injured in over-the-road vehicle accidents, one or more drugs were detected in 67 percent of the drivers and 33 percent of the drivers had detectable blood concentrations of psychoactive drugs or alcohol. D. Crouch, M Birky et. al., *Prevalence of Drugs and Alcohol in Fatally Injured Truck Drivers*, 38 J. Forensic Sci. 1342-53 (1993). An analysis of the toxicology reports from 829 over-the-road vehicle fatalities in 23 states — which represents 28 percent of all such fatalities — revealed that more than 11 percent of the victims were "positive" for one or more illegal drugs. W.M. Marine, B. Derstine, and T. Jack, Bureau of Labor Statistics, *Analysis of Toxicology Reports from the 1991 Census of Fatal Occupational Injuries* (1991). Additionally, preliminary results from the Federal Highway Administration's (FHWA) four-state roadside testing program place the "positive" rate for truck drivers at 3.9 percent for illicit drugs in 1993. Federal Highway Administration, U.S. Dept. of Transportation, *Random Roadside Testing Pilot Program*, (1993).

[51] For example, employees testing "positive" on preemployment drug tests at Utah Power and Light were five times more likely to be involved in a workplace accident than those who tested "negative." *A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program:*

The lessened effectiveness of these programs when not implemented in conjunction with drug testing is further indicated by the growing prevalence of urinalysis in American society. This increase is directly attributable to the realization of organization leaders that the less intrusive methods in place in their organizations were not addressing the problem. The School Board in Vernonia is representative of thousands of organizations across the United States in this regard.[52]

C. Employees Recognize that Drug Testing is a Necessary Tool for Combatting Drug Abuse.

Studies conducted by the Institute have repeatedly demonstrated employee acceptance of drug testing as a necessary tool for combatting drug abuse at their workplaces and in their communities. The Institute has conducted 19 Gallup surveys — 17 state surveys, and national surveys in the United States and Canada. In all, the surveys involved more than 10,700 employees. The vast majority of employees expressed strong support for their employers' role in the "war on drugs," including drug testing. A majority

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Absenteeism, Accidents, and Costs, supra. Similarly, personal injuries and accidents dropped dramatically at Southern Pacific Railroad since the implementation of drug testing. Injuries dropped from 2,234 in 1983 to 322 in the first six months of 1988 (which at an annualized rate would be 644, a 71 percent reduction). Train accidents due to human failure also decreased from 911 in 1983 to 54 in the first part of 1988 (108 at an annualized rate, or an 88 percent increase). *Results of the Drug Testing Program at Southern Pacific Railroad, supra*.

[52] Brief for a writ of certiorari for Petitioner at 11, *Vernonia Sch. Dist. 47J v. Acton*, 23 F.3d 1514 (9th Cir. 1994) (No. 94-590) (Vernonia only implemented drug testing after other methods of deterrence and detection failed.)

of workers in all surveys viewed drug testing as a necessity,[53] and supported a drug-testing program in their own workplaces.[54] More than 90 percent of the employees in the national U.S. survey thought it was a "good idea" to test persons in safety-sensitive jobs such as airline pilots, transportation workers, and truck drivers. More significantly, substantial majorities of employees also favored testing of factory workers (73 percent), office workers (61 percent), and workers "in their own occupations" (69

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[53] In the national U.S. survey, 68 percent of the respondents thought that drug testing was a necessity or something that should be done. An additional 28 percent thought drug testing should be used in certain circumstances. Only three percent of the respondents felt that drug testing was not needed. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home*, conducted for the Institute for a Drug-Free Workplace by the Gallup Organization. Princeton, New Jersey (1989). The state surveys showed similar results. The Georgia survey showed the most employees in support of drug testing, with 79 percent saying drug testing was a necessity, an additional 20 percent supporting testing in limited circumstances, and only one percent saying drug testing was not needed. *Survey of 807 Georgia Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1994). Massachusetts employees were at the opposite end of the spectrum in the states surveyed, but *still* very supportive of drug testing, with 50 percent saying drug testing was a necessity, an additional 45 percent supporting testing in limited circumstances, and five percent saying drug testing is not needed. *Survey of 500 Massachusetts Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1991).

[54] In the national U.S. survey, 60 percent supported a drug-testing policy in their own workplace, and only 24 percent were against one. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home, supra*. The state surveys varied with a high level of support of 77 percent in Texas, *Survey of 500 Texas Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1991), and a lower — but still high — level of support of 57 percent in Pennsylvania. *Survey of 411 Pennsylvania Employees*, conducted for the Institute by the Gallup Organization. Princeton, New Jersey (1994).

percent).[55] In sum, more than two-thirds of employees in effect said, "you should test me."

These Institute Gallup surveys are strengthened by other similar surveys of smaller groups.[56] In addition, a 1987 survey of Navy personnel revealed that 83 percent considered random testing the Navy's strongest deterrent to drug abuse.[57]

Similarly, a study of 919 union members from 13 major unions revealed that nearly 77 percent support a policy of drug testing when individual privacy is protected.[58] The primary reason for the support: drug testing is an effective deterrent.

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[55] Although only the national U.S. survey is cited, the lowest and highest acceptance rates in the state surveys were as follows: should test safety-sensitive positions: (97 percent, highest — Georgia, 92 percent, lowest — Washington); should test factory workers: (87 percent, highest — Georgia, 64 percent, lowest — Massachusetts); should test office workers (75 percent, highest — Georgia, 46 percent, lowest — Massachusetts).

[56] *See also*, Equifax, Inc. 1990. (83 percent and 66 percent of employees favored preemployment and universal random testing respectively) Daily Labor Report, Bureau of National Affairs, June 12, 1990, at A-14; Industry Week Readership Survey 1992. (In 1990, 93 percent of those surveyed thought their company should test (up from 88 percent in 1988)). Michael Verespej, *Drug Users — Not Testing — Anger Workers: Resistance to Workplace Testing May be a Thing of the Past*, Industry Week, February 17, 1992, at 33.

[57] *Winning the War on Drugs — Check the Military*, *supra*, at 4.

[58] Michael Leroy, *Discriminating Characteristics of Union Members' Attitudes Toward Drug Testing in the Workplace*, 12 J. Lab. Res. 453 (1991).

Employee support of urinalysis drug testing is testimony to its effectiveness as a deterrent and as a means of detection. Employees are the group that has been required to undergo the most testing, and would therefore seem to be the most likely to oppose or resent urinalysis drug testing — *if* it were inappropriate. To the contrary, employees as a whole accept urinalysis drug testing because they recognize its necessity to ensuring safety, getting treatment to drug-dependent co-workers, and deterring other people from becoming drug abusers.[59]

Conclusion

The Institute respectfully urges the Court to consider the pervasiveness of the drug-abuse problem in the United States and the devastating harm caused by drug abuse in determining the need for drug testing in public schools and their athletic programs, such as Petitioner's.

Furthermore, the Institute respectfully submits that, over the last decade, urinalysis drug testing has become so widely used and accepted in the private-sector work force, and its procedures so well refined, that the urine specimen collection process intrudes only minimally on an individual's legitimate privacy expectations.

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[59] In the national U.S. survey conducted for the Institute by the Gallup Organization, workers who supported a drug-testing policy were asked why they supported it. Some of the most frequently given reasons were to increase safety, stop drug abuse, help others on drugs, and deter new users. *Survey of 1,007 Full-Time Employees, Aged 18 and Older, Working Outside of the Home*, *supra*.

Finally, and most importantly, the Institute asks the Court to reaffirm the appropriateness of drug testing as a deterrent and as a means of detection in combatting drug abuse in the United States.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 473,
Petitioner,

v.

WAYNE ACTON and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE CALIFORNIA INTERSCHOLASTIC FEDERATION IN SUPPORT OF PETITIONER

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IN THE

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OCTOBER TERM, 1994

No. 94-590

VERNONIA SCHOOL DISTRICT 473,
Petitioner,
v.
WAYNE ACTON and JUDY ACTON,
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On Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CALIFORNIA INTERSCHOLASTIC FEDERATION IN SUPPORT OF PETITIONER

This brief is filed with consent of both parties. Letters of consent are filed concurrently herewith with the Clerk of this court.

INTEREST OF *AMICUS*

The California Interscholastic Federation is a legislatively authorized association of approximately twelve hundred high schools charged with the responsibility of enacting and enforcing rules relating to eligibility for, and participation in, interscholastic athletics in the State of California. Issues potentially arising from the question before the court impact the discretion of this amicus, and the local schools which make up its membership, as well as the discretion of similar organizations, and local schools, throughout the United States.

This amicus is a legislatively recognized association of approximately twelve hundred high schools in the state of California which has been charged with the responsibility of "enacting and enforcing rules relating to eligibility for, and participation in, interscholastic athletics"[1]. The purpose of this brief is to support the ability of school boards and educators to evaluate and administer

[1] The California Interscholastic Federation (CIF) functions pursuant to Sections 35179 and 33353 of the California Education Code. It's structure is that of a legislatively recognized association of schools in the state of California There are similar high school associations in all fifty states of the United States and each of these associations is a member of the National Federation of High School Activities Associations which is located in Kansas City, Mo. The CIF's history is not atypical of similar social developments in the United States.

The CIF was founded in Los Angeles County, in 1914, by high school principals from some Los Angeles communities for the purpose of establishing such basic rules as requiring that high school players be enrolled in high school, that they be of a certain age, etc. There was no legislative authorization and not a great deal of concern about such legalistic niceties as authorization to exist, etc. and yet the organization has flourished. Today, all of the approximately twelve hundred high schools in California belong to the CIF. It consists of ten Sections and approximately 125 to 150 leagues. The organization sounded in contract (each school agreeing not to play any school which did not follow the same rules) and it operated on an extra legal basis until 1980 when it came to the notice of the California Legislature that no legislative authorization had ever been given for local communities to structure high school athletics. The Legislature thereupon granted legislative approval for the local boards to do what they had been doing since 1914. According to Los Angeles County census records, in 1914, the population of Los Angeles County 790,000. At present, it is 9,237,500. The state's present population, according to the California Department of Finance census records, is 32,140,000.

It is submitted that the organization flourished as it has because it has—notwithstanding the absence of legislative authorization for most of its existence—adhered to the social contract or bargain that exists between schools and communities and between associations and athletics—that academics will be honored over athletics and that equity of competition will be sought and maintained.

conditions present in their own communities and to urge caution with respect to any analysis which might result in an inference or argument that participation in interscholastic athletics is a right as opposed to a discretionary activity. It is the task of school boards and high school educators to balance the emotional appeal of athletics with the necessity of academics. Any inference arising from the court's opinion that interscholastic athletic participation is a right, as opposed to an activity, is likely to lead to voluminous litigation, in the context of asserted constitutional rights, of matters which local school districts, and the associations to which they belong, have been managing for the better part of a century and which may be better handled at the schoolhouse than elsewhere. It is the hope of this amicus that the discretion of local educators in the area of interscholastic athletics will be confirmed in the court's opinion.

This brief will seek to demonstrate that an overbroad view of interscholastic athletic participation as a purported *right* will result in serious consequences in a number of areas which have been held to be, and should be, within the discretion of local boards and the athletic associations to which they belong. Areas of concern, among others, are the maintenance of competitive equity between competitors; the maintenance of an appropriate educational balance between athletics and academics; the maintenance of the integrity of the athletic system; maintaining efforts to control the effects of recruiting and school shopping for the purpose of athletics; limitations of semesters and of age with respect to interscholastic athletic eligibility which corresponds to encouraging students toward a steady and appropriate progress through the educational system and considerations of safety; the organization of athletics into leagues, divisions, etc.; the construction and enforcement of playing rules; the discipline of athletes and students and maintaining an appropriate athletic structure in order to provide appropriate enjoyment and school enthusiasm to the community as a whole.

A number of cases, cited later in this brief, have held that athletic participation is not a right and the court is asked, in the analysis of the case at bar, to affirm that principle.

ARGUMENT

I. COMPETITIVE EQUITY

Woven throughout the entire subject matter of athletics is the subject of competitive equity—i.e., the inherent bargain in athletic competition to compete fairly. It's presence has been recognized in the case of *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1, 26 CR2 834 (1994), which involved drug testing, as does this case.

The inherent bargain to compete fairly, however, extends further. It is intrinsic to the phrase: *Hey, pick on someone your own size!*—a phrase not found in the statutes but nevertheless a well known and accepted expression of fair play[2]. The phrase represents the communities' recognition that there should be a rough equality or equity between adversaries and that standard is expected to prevail in interscholastic athletics. If it is not present, or if it not believed to be present, the result is a disappreciation of the values of the activity and a resulting loss of respect for the integrity of the program.

It is an unavoidable consequence that when faith in the integrity of the program wanes, coaches and participants will begin to stretch the rules to the outer limits, or perhaps ignore them, in an effort to attain what they see as competitive equity. Thus, if weight limits are only sporadically enforced, the result is a stretching, or

[2] "I'll tell you what this case is about. I wrestled when I was in college. If I were wrestling tomorrow I'd want to know if my opponent had something more than Wheaties for breakfast. That's what this case is about!"

Comments of the Honorable Armand Arabian, Justice, California Supreme Court, during oral argument of the case of *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, 26 CR2 834.

ignoring, of the rules on weight limits. Similarly, if illegal practices are believed to be occurring, competitors will begin illegal activities to remain competitive. Thus, integrity in the system—if reasonable controls are to be maintained—is essential. The cases cited in this brief—regardless of the point made in any particular case—stand as testimony to the emotionality with which athletic participation is approached by some young people and, in many cases, their parents and coaches. There are far more decisions analyzing the legal ramifications of being disqualified from an athletic team than there are with regard to flunking an algebra examination. There is a great deal of emotionality that goes into the desire to engage in athletic competition. To maintain the integrity of that competition, everyone must reasonably believe that everyone else is playing by the same rules.

Competitive Equity also includes structure. Competition, by definition, includes two or more and that implies structure. When the number of competitors grows to the hundreds structure is no longer implied. It is necessary. In all states of which this amicus is aware schools are divided up and arranged into leagues which, in turn, are arranged into divisions or some similar grouping by some name. Leagues are generally composed of eight schools although some leagues have a few more and some have a few less.[3]

Implicit within the concept of fair play is the conceptual bargain that the schools within a league should be com-

[3] Eight schools is generally considered the ideal number of schools for a league for a number of reasons. In football, for instance, an eight team league is able to play seven league games and three practice games for a ten game season. This *single round robin* approach is considered the best in terms of leaving time for playoffs and championships and still ending all activities before the Christmas vacation. Basketball, which is usually a *double round robin* approach, works about the same for the winter season as does baseball/softball for the spring season when it is necessary to end all athletic activities in time for the students to study for the final exams for the year.

petitive so that it is not possible for one school to dominate the others and thereby monopolize the league championship. The same is true of divisions: One league should not dominate a division. Thus, when it is agreed to enter into competition it is also, implicitly, agreed that structure will be designed—and adjusted as needed—to create a competitive atmosphere. As a consequence, as the population shifts and schools grow or diminish in size or athletic competitiveness, leagues are realigned and adjusted, on a periodic basis, to insure the continuation of competitive equity. There is no right to play particular schools; to compete against particular athletes or teams; to play in, and dominate, a particular league or division. Instead, there is the obligation to play fair and to play competitively and the activity of playing at all depends upon the fulfillment of that obligation.

Competitive equity has sometimes been expressed as the *American Way of Fair Play* and, in essence, that is just what it is. To play on a level field, by the same rules[4] and to take no unfair advantage. In order to escape the unavoidable consequences that occur when competitors believe that another has an advantage of some sort by engaging in activities believed to meet that advantage, the court is asked to be sensitive to the reality of competitive equity as it considers the case at bar.

[4] In 1839 the residents of Cooperstown, New York would play a summer game called town ball. The game involved hitting a ball with a bat which had been thrown at the batter by another player. The field of play was undefined and every ball hit was a fair ball. There were no defined areas to run within, or run to, and scoring was an argument; not a factual determination. A young man who observed the game one day was appalled by the lack of definition and fairness and so he sat down and authored some rules of structure and protocol for the game. He called it baseball. It became the 'national pastime'. His name was Abner Doubleday.

The story is aprocryphal. According to Ken Burns, the co producer of the Public Broadcasting's *Baseball*, Abner Doubleday was not at Cooperstown, when all of this supposedly occurred, but at West Point where he was learning the skills which would result in him serving as a General officer for the Union Army at the Battle of Gettysburg. However, it does not matter that the legend is false. It's endurance has nothing to do with Abner Doubleday's proximity to the game of baseball. Rather, its longevity is found in what it tells us about ourselves, about sports, about structure and about playing fair. It tells us that as fiercely independent as we may be, we must have rules and structure—a bargain between ourselves whereby we all impliedly consent to play by rules which level the playing field and bring equity to our exercise in civilized competition. It is our antidotal recognition of the truth that it is only when the rules have been set, and the bargain struck, that the game can be played.

II. OVERWHELMINGLY, COURTS WHICH HAVE CONSIDERED THE QUESTION HAVE CONCLUDED THAT INTERSCHOLASTIC ATHLETIC PARTICIPATION IS NOT A RIGHT

It is recognized that the concept of interscholastic athletics when addressed as not being a right does not carry with it the conclusion that the activity does, or should, prevail over all other values enunciated by the Congress or the various Legislatures. It is recognized, and not contested, that interscholastic athletics is subject subordination when its rules clash with constitutional and statutory proscriptions such as racial discrimination, gender discrimination, etc. The fact that interscholastic athletics is subordinated to such proscriptions, however, does not lead, and should not lead, to the conclusion that athletics is, in and of itself, either a property right or liberty interest. This concept was best expressed in *Albach v. Odle*, 531 F.2d 983 (10th Cir. 1976) in which the court said:

> "Appellant cites numerous cases in support of the contention that high school athletic regulations must survive constitutional scrutiny. The cases are distinguished by the fact that, in the context of athletic regulations, clearly defined constitutional principles are at issue. *See Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir.), *Gilpin v. Kansas*

State High School Activities Ass'n, Inc., 377 F.Supp. 1233 (D.Kan.), and *Reed v. Nebraska School Activities Ass'n*, 341 F.Supp. 258 (D.Neb.)—sexual discrimination; *Davis v. Meek*, 344 F.Supp.. 298 (N.D. Ohio)—invasion of marital privacy. *See also Howard University v. National Collegiate Athletic Ass'n*, 166 U.S.App.D.C. 260, 510 F.2d 213—alienage discrimination; *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224 (5th Cir.)—racial discrimination. That is not the case here. Participation in interscholastic athletics is not a constitutionally protected civil right. *Oklahoma High School Athletic Ass'n v. Bray, supra; Mitchell v. Louisiana High School Athletic Ass'n*, 430 F.2d 1155 (5th Cir.) *The supervision and regulation of high school athletic programs remain within the discretion of appropriate state boards, and are not within federal cognizance under 42 U.S.C. § 1983 unless the regulations deny an athlete a constitutionally protected right or classify him or her on a suspect basis."* (Emphasis added.)

This amicus is also aware of contentions that athletics should be referred to as a privilege although the privilege-right distinction has arguably been abandoned. This does not affect the substance of the position taken herein, however. As the court stated in *Walsh v. Louisiana High School Athletic Assoc.*, 616 F2 152 (5th Cir.):

> "The plaintiffs correctly note that a constitutional challenge to the denial of a benefit cannot be answered merely by arguing that the benefit is a privilege rather than a right. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011; *Shapiro v. Thompson*, 394 U.S. 618. 89 S. Ct. 1322; *Sherbert v. Vrner*, 374 U.S. at 404-06, 83 S. Ct. at 1794-95. . . . However, the plaintiffs fail to note that, despite the abandonment of the right-privilege distinction, there remain some interests that are outside the scope of constitutional protection. The due process clause of the fourteenth amendment extends constitutional protection

> to those fundamental aspects of life, liberty, and property that rise to the level of a 'legitimate claim of entitlement' but does not protect lesser interests or 'mere expectations'. . . . A student's interest in participating in a single year of interscholastic athletics amounts to a mere expectation rather than a constitutionally protected claim of entitlement. As decided in *Mitchel*, it falls 'outside the protection of due process'. . . ."

It is also recognized that *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, recognizes a student's entitlement to a public education as an interest which is constitutionally protected. As the court stated in *Aubach v. Odle, supra*, however,

> "(I)t is necessary to note that in framing the property interest the Court in *Goss* speaks in terms of the 'educational process.' 419 U.S. at 576, 95 S.Ct. at 737, 42 L.Ed. at 735. The educational process is a broad and comprehensive concept with a variable and indefinite meaning. It is not limited to classroom attendance but includes innumerable separate components, such as participation in athletic activity and membership in school clubs and social groups, which combine to provide an atmosphere of intellectual and moral advancement. We do not read *Goss* to establish a property interest subject to constitutional protection in each of these separate components."

It is submitted that there is no constitutional right to recess.

In the context of the above, there are a substantial number of cases which have held that participation in interscholastic athletics is not a right.

In the case of *Adamek, et al. v. Pennsylvania Interscholastic Athletic Association*, 57 Pa. Cmwlth. 261, 426 A.2d 1206 the court held that students had no constitutionally protected property interest in participating in interscholastic high school sports, despite alleged possi-

bility of athletic scholarships, and thus the high school athletic association's ordering high school football team to forfeit three victories because of participation of scholastically ineligible player could not deprive students of due process rights.

The court described the issue as follows:

> "While this precise question is a novel one for this Court, no fewer than thirty jurisdictions have previously addressed this issue. The overwhelming majority of these jurisdictions have rejected the notion that participation in athletics is a property right." See also: *Walsh v. Louisiana High School Athletic Ass'n,* 616 F.2d 152, *reh. denied,* 621 F.2d 440 (5th Cir. 1980); *Hamilton v. Tennessee Secondary School Athletic Ass'n,* 552 F.2d 681 (6th Cir. 1976); *Albach v. Odle,* 531 F.2d 983 (10th Cir. 1976); *Parish v. NCAA,* 506 F.2d 1028 (5th Cir. 1975); *Mitchell v. Louisiana High School Athletic Ass'n,* 430 F.2d 1155 (5th Cir. 1970); *Oklahoma High School Athletic Ass'n v. Bray,* 321 F.2d 269 (10th Cir. 1963); *Kite v. Marshall,* 494 F.Supp. 227 (S.D.Tex.1980); *Ward v. Robinson,* 496 F.Supp. 1 (E.D.Tenn.1978); *Kulovitz v. Illinois High School Ass'n,* 462 F.Supp. 875 (N.D.Ill.1978); *Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n,* 443 F.Supp. 753 (S.D.Ohio 1978); *Colorado Seminary v. NCAA,* 417 F.Supp. 885 (D.Colo.1976), *aff'd,* 570 F.2d 320 (10th Cir. 1978); *Dallam v. Cumberland Valley School Dist.,* 391 F.Supp. 358 (M.D.Pa.1975); *Stock v. Texas Catholic Interscholastic League,* 364 F.Supp. 362 (N.D.Tex.1973); *Taylor v. Alabama High School Athletic Ass'n,* 336 F.Supp. 54 (M.D.Ala.1972); *Paschal v. Perdue,* 320 F.Supp. 1274 (S.D.Fla.1970); *Florida High School Activities Ass'n, Inc. v. Bradshaw,* 369 So.2d 398 (Fla.App.1979); *Smith v. Crim,* 240 Ga. 390, 240 S.E.2d 884 (1977); *Kriss v. Brown,* 390 N.E. 193 (Ind.App.1979); *Kentucky High School Athletic Ass'n v. Hopkins County Bd. of Educ.,* 552 S.W.2d 685 (Ky.App.1977); *Sanders v. Louisiana High School Athletic Ass'n,* 242 So.2d 19 (La.App.1970); *NCAA v. Gillard,* 352 So.2d 1072 (Miss.1977); *State ex rel. Missouri State High School Activities Ass'n v. Schoenlaub,* 507 S.W.2d 354 (Mo.1974); *Bruce v. South Carolina High School League,* 258 S.C. 546, 189 S.E.2d 817 (1972); *Tennessee Secondary School Athletic Ass'n v. Cox,* 221 Tenn. 164, 425 S.W.2d 597 (1968); *Sullivan v. University Interscholastic League,* 599 S.W.2d 860 (Tex.Civ. App.1980); *Trofimuk v. PIAA,* 7 D. & C.3d 712 (C.P.Butler 1978).

The court in *Adamek* went on to say: "Moreover, injury from lost media exposure and lost opportunities for athletic scholarships are "too speculative to establish a property interest as defined in (*Roth*") *Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (.) *Parish v. National Collegiate Athletic Ass'n,* 506 F.2d 1028 (1034 n. 17) (5th Cir. 1975). *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association, supra* note 1, at 758 n. 37." See also, *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677.

III. AN INFERENCE THAT INTERSCHOLASTIC ATHLETIC PARTICIPATION IS A RIGHT CAN PRODUCE DELETERIOUS EFFECTS UPON EDUCATIONAL MATTERS WHICH HAVE BEEN TRADITIONALLY ADMINISTERED BY LOCAL COMMUNITIES, STATES AND THEIR ASSOCIATIONS

Traditionally, for a century or so, a balance between interscholastic athletics and academics has been maintained through the utilization of certain procedures and rules. The court is requested to be sensitive to these matters and to, if possible, eschew any indication that such rules and procedures are subject to attack upon the inference that athletics are a right in and of themselves. Some of the matters in question are:

A. Recruiting, School Shopping—Rules Relating to Transfer Between Schools

Transfer rules have been upheld in a number of jurisdictions as an appropriate means by which to control the recruiting and school shopping of athletes from one school to another. The rules address transfers without a corresponding change of residence by the students' parents or guardians. As was stated in *Williams v. Hamilton,* 497 F. Sup. 641 (1980).

> "Past history, and especially recent events, have shown the unconscionable actions to which some individuals will resort in order to insure themselves a superior athletic program. Illegal recruiting of promising young athletes is the gravameen of this recurring problem. Not only is the atmosphere of fair competition irreparable clouded, but many times the lives of the athletes themselves in that athletics becomes primary and academicism secondary under the overbearing scrutiny of those who would entice through illicit means. It is unarguable that any state has an interest in prohibiting such occurrences in its high schools. One means towards such a prohibition is to impede those who would be the innocent objects of illegality from being immediately profitable to the perpetrators."

The concern of this amicus is that any indication from this court that participation in interscholastic athletics is a right would lead to the assertion in the courts below that, as a right, it may be engaged in by a transfer student without consideration or qualification as to when the enrollment occurred, whether the parents or guardians accompanied the student, the presence of absence of hardship as a cause of the transfer, etc. Some other cases dealing with the transfer of students, and upholding the right of local communities and states to control same, are: *Albach v. Odle,* 531 F.2d 983 (10th Cir.1976), *Bruce v. South Carolina High School League,* 189 S.E. 2d 708, 258 S.C. 546 (1972), *Chabert v. Louisiana High School Athletic Association,* 312 So. 2d 344, 323 So. 2d 344 (1978), *Cooper v. Oregon School Activities Assoc. & Faherty v. Oregon School Activities Assoc.* (Consolidated), 52 Or. App. 425, 629 P.2d 386 (1979) (Challenge upon religious grounds based upon fact that transfer was from a religious school to a public school.), *Dallam v. Cumberland,* 391 F. Supp. 358, *Quimby v. School District No. 21,* 455 P.2d 1019, *Tennessee Secondary School Athletic Association v. Cox,* 425 S.W. 2d 597, 221, Tenn. 164. *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677, *Walsh v. Louisiana High School Athletic Assoc.,* 616 F.2d 152 (5th Cir.); *Herbert v. Ventetuolo,* 480 A.2d 403 (R.I.); *Berschback v. Michigan High School Athletic Assoc.,* 397 N.W. 2d 234; *Simkins v. South Dakota High School Activities Assoc.,* 434 N.W. 2d 367.

B. Emphasizing Safety and Educational Progress—Age and Semester Limitation Rules

Generally, most states have rules which provide that high school interscholastic athletics is not open to students who have attained their nineteenth birthday by a certain date. The rationale for such a rule involves safety implications created by competition between individuals whose age span is too great, the competitive equity aspects of permitting students who are too chronologically separated to compete against each other, or on opposing teams and, also, the consideration of inducing students to progress through their high school career within an appropriate span of time and to make room in the various programs for other students coming along. Such rules have been discussed in the cases of *Robinson v. Illinois High School Assoc.,* 45 Ill. App. 2d 277, 195 N.E. 2d 38; and *Missouri State High School Activities Association v. Schoenlaub,* 507 S.W. 2d 534. Should the court send a signal that interscholastic athletic participation is a right in itself the argument arising therefrom would be that age limitation rules designed to accomplish the goals set

forth above are questionable as against the right in question.

Semester limitation rules generally hold that a student is eligible for high school athletics for only eight consecutive semesters. The rationale, which is similar to the age limitations rules, is that students should be encouraged to progress through the high school years, and then on to college or a career, within an appropriate period of time and that the enjoyability, or other benefits to be obtained from continued high school athletics, may be withheld to accomplish this academic purpose. The rule also serves to open a finite number of team positions to younger students who are entering, or progressing through, their high school career. Some cases discussing the eight semester rule are: *Murray v. Florida High School Activities Assoc.*, 31 Fla. Supp. 66; *Mitchell, et al. v. Louisiana High School Athletic Assoc.*, 430 F.2d 1155; *Sullivan v. Florida High School Activities Assoc.*, 38 Fla. Supp. 18; *Smith v. Crim*, 240 S.E.2d 884 (Ga.); *Jones v. California Interscholastic Federation*, 197 CA3d 751, 243 CR 27; *Alabama High School Athletic Assoc. v. Medders*, 456 S.2d 284.

C. Matters of Discipline

Cases dealing with discipline in the area of interscholastic athletes are: *Palmer v. Merluzzi*, 868 F.2d 90, 51 Ed. Law Rep. 1196; *Davenport v. Randolph County Board of Education*, 730 F.2d 1395 (11th Cir.); *Bush v. Dassel—Cakato Board of Education*, 745 F.Supp. 562. Clearly the ability utilize interscholastic athletic participation as a disciplinary tool is essential to educators in a number of ways and to hold that interscholastic athletic participation is a *right* would impose a severe hinderance upon the ability of educators to maintain good order and discipline in the educational environment. Values would be turned upside down and, in the normal course of school administration—in the trenches as it were—the

right to participate in athletics would begin to prevail over the ability of educators to control the wayward.[5]

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[5] There are some unusual spinoffs that sometimes occur with respect to discipline and athletics when athletics are confused to be a right. There is a county in California known as Plumas County. It is a rural county near the California Nevada border. It is a one judge county. There occurred an incident this past autumn wherein a young man was observed by the vice principal of the Plumas High School to be engaged in a physical altercation with another young man in the proximity of the vice principal's office. The vice principal, having witnessed what had occurred, placed the young man on a three day suspension. Objection was taken to this decision because the three day suspension would encompass Friday and that is the night that the football team plays its game. The vice principal refused to modify his decision and an appeal was taken to the principal and, also, to the deputy superintendent of the district, all of whom refused to overrule the vice principal. Suit was filed a few hours before game time (4:00 PM to 6:00 PM) and the principal of the high school was notified that the county judge would be reviewing the matter vis a vis a petition for a temporary restraining order. It was too late to contact the school district's lawyer and have him attend. Since the principal believed that he had responsibilities with regard to running the school—teams, crowds, support personnel arriving for the game, facilities being prepared, etc.—he opted not to attend the judge's review. The judge issued a temporary restraining order which permitted the student to play in that game and the student, who arrived at the game with court papers in hand, did play. Students laughed, football fans cheered, the educators were mortified and the community was irate. The case became the cause celebre of the locale and the question of the day became: Who's running the schoolhouse? The school district, with the same inquiry in mind, decided to press on and instructed its' lawyer to file a motion to dissolve the restraining order whereupon the county judge, who issued the restraining order, decided to recuse himself. A judge was brought in from another county who, after reviewing the matter, granted the district's motion. The lesson? Justice is not necessarily at the courthouse when it comes to disciplining wayward students. She is sometimes found in the vice principal's office. The case is *Warren John Mitchell v. Plumas Unified School District*, Plumas County (California) Superior Court Case #17496.

IV. EDUCATIONAL BALANCE

Clearly, as was stated in *Williams v. Hamilton, supra,* the local communities, states, and their associations, have a strong interest in preserving the supremacy of academics over athletics. It is not the role of schools to produce athletes. It is undisputed that education prepares students for an active involvement in community affairs and matters of a civilized society. Without academics the citizenry would lack the knowledge, self-confidence and critical skills to evaluate the comments of the day from journalists and political leaders. Moreover, "(T)he person who reads Homer, Shakespeare, Byron, Joyce, and Yeats, studies music, and the universe, may never achieve economic, social or political advantage, or contribute tangibly to society. But his cultural attainments will produce (the) inner rewards . . . . As Justice Story wrote: 'It is one of the wise dispensations of Providence that knowledge should not only confer powers, but should also confer happiness (Story, Miscellaneous Writings 124)' ". Concurring opinion, Mosk, J., *Hartzell v. Connel,* 35 C.3d 899, 201 CR 601.[6] If academics—and the benefits of education—are going to prevail over the emotional enticements of athletics, however, it is necessary that communities, school boards and educators be provided with the tools to insure

[6] *Hartzell v. Connell,* which prohibited student fees for participation in extra curricular activities was distinguished in *Steffes v. California Interscholastic Federation,* 176 Cal. App. 3d. 739, 222 Cal. Rptr. 355, 29 Ed. Law Rep. 677. *Steffes,* which held there is no right to participate in high school athletics, was cited in 1994, by California Chief Justice Lucas, in *Hill v. National Collegiate Athletic Association* (1994) 7 C. 4th 1, 26 CR2 834, 865 P2 633, 88 Ed. Law. Rep. 327 (at 7 C4 43) when holding that there is no *right* to participate in intercollegiate athletic competition in California. Steffes also held that interscholastic athletic participation is not a right in California notwithstanding the holding in *Serrano v. Priest, supra,* 18 Cal.3d at pp. 765-766, 135 Cal.Rptr. 345, 557 P.2d 929; *Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609, 96 Cal. Rptr. 601, 487 P.2d 1241 that education, itself, is a fundamental right under the California Constitution.

academic predominance at the school house is not impaired. It is a question of balance and it is respectfully submitted that the educators on the scene are in the best position to determine where the fulcrum will be placed and that discretion should be upheld. As stated by Justice Arabian in *Steffes v. California Interscholastic Federation, supra*:

> "The rules, regulations and procedures discussed herein, as they relate to the interscholastic athletic transfer rule, are prophylactic in nature, reasonable in scope and rationally based. As such, they neither trammel upon fundamental rights nor occasion unnecessary burdens.
>
> Curtailment or reduction of the abuses and transgressions which threaten to undermine student athletics are salutary goals which preserve equity between schools and protect the integrity of extracurricular programs."

Steffes, supra at p. 752.

V. PLAYING AS A LITIGATABLE RIGHT

Should an inference be made that interscholastic athletic participation is a *right* the question which next arises is the extent of that *right* and the litigious burdens attendant thereto. It is a matter of common sense that many athletes believe, rightly or wrongly, that they are the best suited at any given moment, or in any given situation, to execute the tasks needed to prevail in the contest. It may also be believed by many, as a corollary, that it is unfair that some other player has been selected to enter the game or to occupy a position. Similarly, promotions to, and reductions from, first string, or from one position to another, are not generally greeted with universal enthusiasm by those who are being moved further from the action of the contest. Finally, secondary motives—to be noticed in order to advance the thought of an athletic career—enter into the equation since dreams of glory are more prevalent in the athletic department than in the

physics department. Litigation touching upon such matters has occurred and is found in the cases. It may seem that a remote familiarity with the world of athletics—where *Smith in for Jones* is a part of the art of the drama itself—would lead quickly to the conclusion that the act of *playing* is not a right but an activity subject to the discretion of coaches and others involved in the production and presentation of the sport and that an asserted litigatable right for *game time*, or *position on a particular string*, would be unlikely. Unlikely, perhaps, but not unknown. These points have been asserted and disposed of on the rationale that there is no property right, or liberty interest, in athletic participation. See *Colorado Seminary (University of Denver) v. NCAA*, 570 F.2d 320 (10th Cir.); *Parish v. NCAA*, 506 F.2d 1028 (5th Cir.), and *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd on other ground, sub nom. Kush v. Rutledge*, 103 S. Ct. 1483 (1983). Should the view that there is no right to athletic participation change, by inference or otherwise, the tendencies toward litigation would be exacerbated and result in disappointed athletes attempting to replace the value judgment of the coach or administrator with the value judgment of the local judge.

Athletics operates on a timetable—one game follows another. Playoffs follow seasons and championships follow playoffs. In the context of athletic activity and administration choices must be made and athletic undertakings are simply not designed for the antiseptic adjudication of conflicts of opinions at the courthouse. For instance, playoffs are bracketed and teams are inserted into those brackets at the end of a given season. Teams play through the brackets, over a period of three to five weeks, or so, until a champion emerges. It is important, at the scholastic level, that the championship be determined, and the season ended by a date certain, since there are final examinations for which to prepare, a new semester on the horizon and a new group of different

activities coming on as the school year moves forward. As rule infractions are determined to have occurred, and consequences meted out, disappointments inevitably occur and to the extent the courthouse comes to be seen as a potential escape from those consequences, the more the protcols, structure and administration designed to serve the entire community are in danger of collapse due to overload. For instance, assuming a determination that a player is ineligible, how much time should—or can—be devoted to the adjudication of whether that determination is correct or fair? Should the playoffs be delayed until the decision is made? One game in the playoffs can't be delayed since such an event would be tantamount to delaying all other teams who must wait for that particular bracket to be determined. Should the athlete be played on the theory that it can all be worked out later? Suppose that athlete make a touchdown, the game winning basket or a ninth inning home run and is later determined to have been ineligible? Other teams will cry foul on the theory that the team in question had the advantage of an ineligible player and they didn't. The integrity of the system is compromised; access to the courts to gain the advantage of an ineligible player encouraged; certainty of results endangered; schedules, which impact a myriad of other educational activities, placed at risk—and all of this because of an analytic conversion of what has been traditionally viewed as a privilege to something called a *right*.

A. Playing as a Right Would be a License Without Limit

Ineligible players are used. Rule infractions occur. Consequences follow and are frequently imposed upon the team as a whole—i.e., disqualification from post season competition, etc. As a result, players not involved with the rule infraction will not play in the playoffs or other post season events. Several issues arise: (1) Does each player have a *right* to play and, therefore, a right of

appeal? (2) Is each player entitled to a hearing based upon his or her personal *right* to play? (3) How much energy is to be devoted to the litigation of such *multiple rights* residing in a number of people? (4) Particularly, how are such hearings and litigation to be accomplished when the facts arise late (as they frequently do) and playoffs are about to commence? (5) What consideration is to be given to potential playoff opponents during these multiple hearings? Other teams, in other brackets, are able to prepare for a single known opponent while the opponents in question must prepare for two possible opponents until the controversy is resolved. Does this impinge upon their *right* to fair play? It has been held that notice at the school—not each team member or parents—is a sufficient notification and that each individual is not entitled to personal notice. The rationale of these cases is that there is no property right or liberty interest in athletic participation. *See Kelly v. Metropolitan Co. Board of Education of Nashville*, 393 F. Supp. 485 (Tenn.); *Hennessey v. NCAA*, 564 F.2 1136, *Moreland v. Western Penn. Interscholastic Athletic League*, 572 F.2 121 (2d. Cir.) and *Justice v. NCAA*, 577 F. Supp. 356 (Ariz.). Should the inference begin to arise that athletics is a *right* the assertion of that *right* will be limitless. It will extend outward to multiple players, parents, fans and the controversies, in the context of attempting to administer these matters as part of a school program, will have no end.

Does the judiciary want to involve itself into the thicket of athletic controversy where screaming at the umpire, and arguing endlessly about what might have been except for some call or other misfortune, is itself another aspect of America's way of playing the game?

CONCLUSION

It is not arguable that athletics provide more emotional gratification than academics—particularly for the young. Although there are no studies, it may be reasonably posited that more hours are devoted, during the fall, in any single week, to watching football than to doing, or assisting in, homework. There are no *fight songs* for algebra, no lighted fields for history, no blaring bands for chemistry, no cheerleaders for biology. High school students who perceive an exciting heroism in the physics lab are decidedly in the minority.

Exciting or not, however, it is to the nation's school boards and educators that the task falls of instilling academics—and the arts—in young minds that may be dreaming other dreams. To achieve any degree of success in this endeavor it is necessary that structure and balance be maintained. Enticing students to appreciate the structure of a well expressed algebraic equation or a well stated turn of a phrase in English Literature will never be as easy as enticing them to the Friday night football game. Nevertheless, however, educators must strive to accomplish a youthful appreciation of the academics and, in that task, formulate a structure that will enhance at least some bit of success.

It is the duty of any lawful people, in any civilized society, to submit to the laws and the courts that interpret them. We do so submit. In that submission, however, we urge that wisdom encourages recognition of the consequences that may be imposed on communities, school boards and educators as a result of decisional inferences of athletic participatory rights. We urge a consideration for the people who must deal with those consequences. Education is more than athletics. It is academics, it is the arts, it is a *balanced* mixture of diverse disciplines and activities which deserves respect as a path toward a life well led.

It is in quest of that respect that this brief is submitted.

Respectfully submitted,

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guardians ad litem for JAMES ACTON,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF PARADISE VALLEY UNIFIED SCHOOL DISTRICT NO. 69 IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF PARADISE VALLEY UNIFIED SCHOOL DISTRICT NO. 69 IN SUPPORT OF PETITIONER

This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court.

STATEMENT OF INTEREST

The Paradise Valley School District is the third largest school district in Arizona, with 34 schools and approximately 31,000 students.

Partly in reliance on the Seventh Circuit decision in *Schaill by Kross v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1988), *reh'g denied* (1989), the Paradise Valley School District adopted a random drug testing program for athletes. However, the program was especially tailored to respect students' privacy rights. The urine sample is given by the student in the nurse's office in conditions of complete privacy, with no one else watching or listening. (Joint Stipulated Statement of Facts, ¶¶ 23-33, Defendants' Exhibits 6, 7, 9, 13, 17 & 18, and MouleDepo. at pp. 8-13). There is, therefore, no greater invasion of privacy than a physical examination, which is uncontested, required of all student athletes in Arizona, who must obtain physical examinations, including providing a urine sample, in order to qualify for athletics in the first place.

In fact, the Arizona Interscholastic Association requires an exhaustive annual physical examination to qualify for athletics. The student must disclose and explain, where applicable, past illnesses, hospitalizations, surgeries and present use of medication. Either or both of these procedures typically include physical manipulation of a male student's genitalia and/or a rectal examination. The AIA rules can require retesting. Being told to go into the nurse's office, be by yourself, and provide a urine sample, is much less of an intrusion than any of these things.

Nevertheless, following the Ninth Circuit decision in *Acton v. Vernonia School Dist.*, 796 F. Supp. 1356 (9th Cir. 1994), the Arizona District Court declared the Paradise Valley system to be unconstitutional.

The background to the Paradise Valley testing program is as follows:

In 1985, a survey was done of the community in connection with a five-year plan for the school district. The results of the survey were that drug was the number one problem. Prevention programs were instituted. These

included written alcohol and drug intervention policies, frequent in service of faculty and students, life skills curriculum, alcohol-free graduation parties, chapters of students against drunk driving, peer leadership programs, and so on.

Nevertheless, a 1988-89 survey showed more than one in five used marijuana, at least monthly, and one in ten used cocaine at least monthly. Another, in 1991, showed one in five students admitted attending school under the influence of alcohol or drugs. Coaches noticed athletes apparently under the influence of steroids. In a July, 1990 survey, 22.3% of high school athletes reported in-season steroid use by team members. Almost half of the coaches reported a belief that athletes on their team used cocaine, steroids or other illegal drugs during the season. Student athletes, parents and coaches believed that 10 to 25% of their child's teammates used illegal drugs. (Stipulated exhibits 1, 2, 5.)

One of the factors leading to the institution of the random drug testing of student athletes was the perception that use of steroids among students had become a significant problem. Attempting to identify the offending students was inadequate. (This is confirmed by the record in the current case before this Court at the trial level: visual observations, even by professionals, are not reliable indicators of whether a student has consumed alcohol or drugs. 796 F. Supp. at 1364.) Strong action was needed out of concern for the health of the student athletes.

Long-term effects of use of steroids include (1) atrophy of the testes, prostrate cancer and impotence; (2) high blood pressure and heart diseases, including cases of bypass operations that were necessary; (3) liver tumors and failure of liver function; (4) stunted growth and permanent short stature in children and teenagers; (5) a 1988 study linked use to "steroid psychosis" marked by

hallucinations, delusions of grandeur, and violent mood swings. Twelve percent of the body builders studied were psychotic: severe paranoia and auditory hallucinations; while another ten percent were described as subthreshold psychotic. *See Beyond Steroids: Human Growth Hormone,* published by Do It Now Foundation, Tempe, Arizona (1989).

The drug testing program has been extremely popular with students and parents. Parents are 18 times more likely to want random testing continued rather than discontinued, and student athletes agree more than 15 to 1 that the program should be continued. Exhibit 16.

The interests of the Paradise Valley School District in reversal of the Ninth Circuit decision, and support of the Seventh Circuit decision, include the following:

(1) Those who sued to declare the program unconstitutional admit that it is perfectly proper in private schools. Paradise Valley, like many public schools across the country, is striving mightily to maintain academic standards equal to or greater than those of private schools. However, if the courts impose a system under which private schools can effectively combat the drug culture among students, whereas public schools cannot, the effort to maintain high academic standards in public schools will be defeated.

(2) The school board in a public school setting has an especially high degree of duty to maintain a drug-free student culture because children in the community are *required by law* to attend the public school. The school board owes a duty to their parents not to require the children, by law, to attend an institution in which a drug culture is prevalent. The undersigned attorney (Horne) has served 16 years on the Paradise Valley School Board, seven years as its president, and regards it as one of his highest duties not to compel children to come to schools that are infused with a drug culture. The Ninth Circuit

decision in Acton is a major roadblock, and puts the state in the unusual position of requiring children, by law, to come to schools where a drug culture is prevalent and effective means of combatting it have been vetoed by the courts.

(3) The school district has a strong interest in protecting the health of its student athletes. The schools should not maintain a competitive athletic program if it cannot effectively combat use of steroids, where competitive pressures result in some students taking the steroids and later suffer atrophy of the testes, prostate cancer, and impotence, high blood pressure and heart disease, liver tumors, stunted growth and permanent short stature, "steroid psychosis," and the other health problems cited above.

ARGUMENT

I. THE NINTH CIRCUIT APPLIED THE WRONG STANDARD.

The Ninth Circuit decision required that the state show a "compelling interest" in order to satisfy the constitutional test. *See Acton v. Vernonia School Dist. 47J,* 23 F.3d 1514, 1522 and 1527 n.3 (9th Cir. 1994). In doing so, the Ninth Circuit improperly ignored this Court's holding in *New Jersey v. ILO,* 469 U.S. 325 (1985) in which this Court held:

> . . . the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. The Court explained further:
>
> > Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and nature of the infraction.

II. EVEN IF A COMPELLING INTEREST WERE REQUIRED, IT IS SHOWN HERE.

In *International Brotherhood of Teamsters v. Dept. of Transportation*, 932 F.2d 1292 (9th Cir. 1991), it was held that truck drivers can be required to give random urine samples because of the state's interest in preventing truck accidents. Preventing atrophy of the testes, prostrate cancer and impotence, high blood pressure and heart disease, liver tumors, stunted growth and permanent short stature, and "steroid psychosis" is an interest that a community has in its children, which is at least as great as that of preventing truck accidents.

III. THE NINTH CIRCUIT MISQUOTED THE FACTS OF ITS CASE.

The Ninth Circuit stated:

> Appellee's contention that conditions in the locker room reduce an athlete's expectation of privacy is similarly unavailing. Normal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination.

Acton, 23 F.3d at 1525.

However, in the Facts section of the same decision, the Ninth Circuit stated:

> A male faculty member, either Mr. Aultman or Mr. Svenson, a coach, is seated on a bench some 12 to 15 feet away while the boy urinates. The student remains fully clothed with his back to the monitor. At no time does the monitor have a view of the student's genitals. Aultman and Svenson testified that they do not always watch the student while he produces the specimen, but they generally listen for the normal sounds of urination. After the student produces the specimen, he returns the cup to the monitor who checks it for temperature and obvious signs of tampering.

Id. at 1517.

In the *Acton* case, the authority figure did not "watch" anyone urinating. Listening from 12 to 15 feet away is far less of an intrusion into privacy than is quite common among student athletes in school locker rooms.

Considering the strong interests in preventing a student drug culture described above, to the extent that such listening is an intrusion at all, beyond what normally occurs in the locker room, it is certainly "reasonable" to protect the legitimate interest of preventing a student drug culture and the other interests described above.

Also, as described in the Facts section above, it is far less of an intrusion than the physical exam required of all students before they are eligible to participate in athletics.

IV. PUBLIC SCHOOL PROGRAMS LIKE THAT IN PARADISE VALLEY INVOLVE NO INTRUSION AT ALL INTO STUDENT PRIVACY.

If this Court were to agree with the Ninth Circuit that having someone 12 to 15 feet away listening for signs of urination is too great an intrusion into privacy to justify the interests in preventing student athletes' use of drugs described above, then we ask the Court to indicate at the same time that public school programs like that in Paradise Valley, *where there is no intrusion into student privacy at all,* would still be constitutional. We assume that this Court does not want to deal with random drug testing of student athletes more than once. Therefore, we respectfully request that if this Court should agree with the Ninth Circuit, that listening from 12 to 15 feet away is too great an intrusion of privacy, outweighing all of the school district's interests in preventing a student drug culture, etc., then we ask that the decision indicate that in programs like that of Paradise Valley, where the urine sample is given in complete privacy, the program is constitutional.

V. THE NINTH CIRCUIT IGNORED SEVERAL OTHER COMPELLING CONSIDERATIONS PUT FORTH IN *SCHAILL*.

The following compelling considerations in *Schaill* are not effectively answered by the Ninth Circuit in *Acton*:

> In the first place, in athletic programs in general there is a much diminished expectation of privacy and, in particular, privacy with respect to urinalysis. There is an element of "communal undress" inherent in athletic participation, which suggests reduced expectations of privacy. In addition, physical examinations are integral to almost all athletic programs. In fact, athletes and cheerleaders desiring to participate in the TSC athletic program have long been required to produce a urine sample as part of a mandatory medical examination.
>
> * * * *
>
> Perhaps even more demonstrative of the special characteristics of athletics is the high visibility and pervasiveness of drug testing in professional and collegiate athletics in this country and in the Olympic Games. The suspension and disqualification of prominent athletes on the basis of positive urinalysis results has been the subject of intense publicity all over the world. See *O'Halloran v. University of Washington*, 679 F. Sup. 997, 1005-07 (W.D. Wash.) (discussing widespread urine testing conducted in collegiate and Olympic athletic competitions, *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988)

864 F.2d at 1318-1319.

CONCLUSION

In a concurring opinion in *TLO*, Justice Powell, joined by Justice O'Connor, stated:

> The primary duty of the school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct is recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

469 U.S. at 350 (Powell, J., concurring) (footnote omitted). Similarly, Justice Blackman, in his concurrence, noted that:

> Education 'is perhaps the most important function' of government, *Brown v. Board of Education*, 347 U.S. 483, 493, and government has a heightened obligation to safeguard students whom it compels to attend schools.

It is respectfully submitted that the Ninth Circuit has ignored these important principles, improperly required a compelling interest where this Court requires only a reasonable interest, ignored the compelling interest of the community in the health of the children, improperly prevented public schools from maintaining high standards and a healthful atmosphere, and ignored the minimal intrusion compared with students' reduced expectations of privacy in athletics, in the locker room, and compared to the far more intrusive annual physical examination re-

quired of all student athletes, the constitutionality of which is uncontested.

It is therefore respectfully requested that the Ninth Circuit decision be reversed, and the Seventh Circuit decision be supported, or in the alternative, that the Court indicate that programs like that of Paradise Valley, where there is no intrusion into the privacy of the student, are constitutional.

Respectfully submitted,

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, PARENTS' ASSOCIATION TO NEUTRALIZE DRUG & ALCOHOL ABUSE, INC., ALBANY FREE FROM DRUG ABUSE, AND DRUG WATCH OREGON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990) 4

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Moule v. Paradise Valley Unified School District No. 69, 863 F. Supp. 1098 (D. Ariz. 1994) 16

National Treasury Employees Union v. von Raab, 489 U.S. 656 (1989) . . . . . *passim*

New Jersey v. T.L.O., 469 U.S. 325 (1985) 6

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Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) . . . 3, 9, 18, 22

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Miscellaneous:

Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757 (1994) 8

Zili Amsel, et al., *Anabolic Steroid Use Among Male High School Seniors*, 261 J. Am. Med. Ass'n. 2639 (1989) 15

Peter Brukner & Karim Khan, *Clinical Sports Medicine* (1993) 13, 14, 20

Asbjorg Salberg Christopher & Jorg Morland, *Drug Analysis for Control Purposes in Forensic Toxicology, Workplace Testing, Sports Medicine and Related Areas*, 74 J. Pharm. & Toxicol. 202 (1994) 17

Council on Scientific Affairs, American Medical Association, *Ensuring the Health of the Adolescent Athlete*, 2 Arch. Fam. Med. 446 (1993) 19

Frank H. Gawin, et al., *Stimulants, in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) 14

John S. Hallagan, et al., *Anabolic-Androgenic Steroid Use by Athletes*, 321 N. Eng. J. Med. (1989) 15

J. Thomas Ilngerleider & Robert N. Pechnick, *Hallucinogens, in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) 14

Yifrah Kaminer, *Adolescent Substance Abuse, in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) 10

Charles Feeney Knapp, Note, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 Iowa L. Rev. 107 (1990) 13, 15, 20-21

John A. Lombardo & John W. Toga, *Preparticipation Screening and Performance Assessment*, *in* Clinical Sports Medicine (William A. Urn & Alexander Kalonak, eds., 1991) 20

Robert B. Millman & Ann Bordwine Breeder, *Cannabis*, *in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) 13

8 National Report on Substance Abuse, no. 10 (Apr. 22, 1994) 18

Harrison G. Pope & David L. Katz, *Psychiatric and Medical Effects of Anabolic Androgenic Steroid Use*, 51 Arch. Gen. Psych. 375 (1994) 15

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989) 8

William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553 (1992) 21

Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 B.U.L. Rev. 593 (1990) 21

U.S. General Accounting Office, *Drug Misuse: Anabolic Steroids and Human Growth Hormone* (August 1989) 15

Jon C. Wagner, *Enhancement of Athletic Performance with Drugs in* 12(4) Sports Medicine (1991) 14, 15, 16

The White House, National Drug Control Strategy, *National Household Survey on Drug Abuse* (Feb. 1994) 11

Eric Wish & Bernard A. Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, *in* Drugs and Crime (Michael Tonry & James Q. Wilson, eds., 1990) 17

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ET AL., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with over 100,000 supporters nationwide whose interests WLF represents. WLF engages in litigation and participates in administrative proceedings in a variety of areas and devotes a substantial amount of its resources to supporting the Nation's campaign against drug abuse. To that end, WLF

has appeared as an *amicus curiae* before federal and state courts nationwide in cases involving drug testing. *See, e.g.*, *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991); *Loder v. City of Glendale*, 34 Cal. Rptr. 2d 94 (Cal. App. 2 Dist. 1994).

Parents' Association to Neutralize Drug & Alcohol Abuse, Inc. (PANDAA) is a national non-profit organization dedicated to curtailing illegal drug use, especially by our Nation's youth. PANDAA was founded in 1980 by parents concerned about teenage alcohol and drug abuse. PANDAA believes schools have an obligation to the community and the families they serve to provide an alcohol- and drug-free learning environment for students. PANDAA supports drug education in schools and strictly enforced consequences for violations, in light of the effects of peer pressure and drug-using role models in exacerbating the drug abuse problem.

Albany Free From Drug Abuse (AFFDA) is a non-profit organization based in Albany, Oregon that assists families affected by substance abuse, assists in placement for treatment, and provides support following treatment.

Drug Watch Oregon, an affiliate of Drug Watch International, seeks to reduce demand for psychoactive and addictive substances in the state by providing Oregonians with scientifically documented information about the physiological, social, and economic damage that such substances cause. Serving as an information resource center on a wide range of drug-related topics, Drug Watch Oregon produces pamphlets, books, newsletters, video and

audio tapes and conducts presentations and workshops on drug abuse issues.

Amici submit this brief in support of Petitioner with the written consent of both parties. Letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This case involves the constitutionality of a drug testing program for student athletes in a small school district in Oregon, but its significance is much broader. After a decade of hard-won success in reducing the prevalence of drug use in our society, we have become complacent and now are poised on the brink of a new disaster. Over the past two years, drug use by high school seniors has increased by one-third; among eighth graders the rate of increase is even greater. At this critical juncture, we cannot afford to renounce one of the most effective techniques for preventing drug use.

Drug testing works. In our armed services, it has virtually eliminated a formerly rampant and debilitating drug problem. Most large private-sector employers now use drug testing, and the percentage of employees testing positive has declined substantially each year. Drug testing laboratories licensed by the U.S. Department of Health and Human Services conduct millions of urinalysis tests each year with a high degree of accuracy and reliability.

The major barrier to greater use of drug testing is legal uncertainty. This Court's decisions in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. von Raab*, 489 U.S. 656 (1989), have been read in a grudging manner by many

lower courts, including the court below, to hold that public-sector drug testing can be constitutional only if undertaken to prevent horrible disasters such as train wrecks or nuclear power plant explosions. Even criminal prosecutors at the Justice Department cannot be subjected to random drug testing unless they prosecute drug cases specifically or have access to Top Secret classified information.[1]

Even more debilitating than the actual holdings of the cases below has been the burden of litigation. Each government agency's testing program for each category of employees has been potentially subject to lawsuits all across the country, with judges performing a detailed weighing of the evidence bearing on the reasonableness of each aspect of the program. Even now, eight years after its promulgation, the drug testing requirements of President Reagan's Executive Order 12,564 have yet to be fully implemented by all government agencies. It is not surprising that school districts and local governments have been even less likely to implement drug testing programs and undertake the inevitable burden of litigation, not to mention the risk of damages and attorneys fees under 42 U.S.C. §§ 1983 and 1988.

This Court should adopt a clear holding that administrative drug testing programs are presumptively reasonable, and thus constitutional, so long as the government has a legitimate interest in preventing drug use among participants in a particular program or activity. The governmental interest should not have to be so dramatic as

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[1] *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

the prevention of a nuclear disaster, but should also extend to the integrity and efficiency of its work force or the health and safety of children entrusted to its care. Under such circumstances, the Fourth Amendment should require only that the criteria for testing be neutral and nondiscriminatory, with reasonable safeguards to protect the privacy of those being tested.

If the lower courts are authorized to evaluate the constitutionality of programs such as this one under a totality-of-the-circumstances balancing test, then there will be no stability in the law. Even if the Vernonia testing is sustained, other programs will be discouraged by the threat of litigation and the fear of judicial hostility.

This should not be a difficult or close case. It is hard to imagine a more compelling societal interest than preventing middle and high school students from using illegal drugs. The school district has a particularly strong interest in the health and fitness of students who participate in competitive athletics. Athletes are traditionally subject to a number of requirements that diminish the sense in which a drug test would violate their expectation of privacy. Indeed, it is common for students to be required to take a physical examination, often including urinalysis, as a condition of being allowed to participate in competitive sports. If students can be required to produce urine specimens to be tested for glucose, surely the specimens can also be tested for amphetamines or cocaine.

ARGUMENT

I. This Search Should Be Judged on a General Standard of Reasonableness

This Court has applied the Fourth Amendment outside the context of law enforcement, but with a recognition that the rules and presumptions governing police activity are not appropriate in other settings. "Searches" are routinely conducted of persons entering courthouses or airports, or leaving libraries, without a warrant or individualized suspicion of criminal conduct. *See von Raab*, 489 U.S. at 675 n.3; *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 474 n.18 (1990) (Stevens, J., dissenting). The government can impose requirements on its employees, including the requirement to show up for work each morning, that could be characterized as "searches" or "seizures." *See O'Connor v. Ortega*, 480 U.S. 709 (1987). Similarly, this Court has recognized that the Fourth Amendment applies in a different way in the school setting, where teachers and administrators are not treated as if they were police officers. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

The Court's expansive approach to defining searches and seizures could quite logically extend to a variety of government activities not traditionally thought to implicate the Fourth Amendment. It could be said that citizens are "seized" when required to appear for jury duty or to give a deposition when not a party to a lawsuit. A pre-induction physical examination of potential draftees would appear to be a "search," as would a drill sergeant's footlocker inspection or a government doctor's examination of an unconscious patient brought to a hospital. Indeed, taxation

or the condemnation of property could readily be characterized as a "seizure."

In all of these non-police settings, the Fourth Amendment basically requires that searches and seizures be reasonable. The Court has applied a balancing test to determine the constitutionality of such intrusions, taking into account a variety of factors. In applying this test, however, the Court must be careful not to revive the judicial activism of the early Twentieth Century. A thoughtful student of the Court's Fourth Amendment jurisprudence recently observed as follows:

> To be sure, the Amendment is triggered only by a 'search' or 'seizure,' and to ignore these triggers is to rewrite the Amendment into a global command of reasonableness. Yet a great many government actions can be properly understood as 'searches' or 'seizures,' especially when we remember that a person's 'effects' may be intangible — as the landmark *Katz* case teaches us. Unlike the Due Process Clause, in whose name so much has been done, the Fourth Amendment clearly speaks to substantive as well as procedural unfairness and openly proclaims the need to distinguish between reasonable and unreasonable government policy. For those who believe in a 'substantive due process' approach to the Constitution, the Fourth Amendment thus seems a far more plausible textual base than the Due Process Clause itself. For those who

> believe in general rationality review, the Fourth, here too, is more explicit than its current doctrinal alternative, the Equal Protection Clause.

Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 811 (1994) (footnotes omitted).

In view of the potential scope of Fourth Amendment reasonableness review, the Court should be careful to emphasize that judges are not entitled to substitute their own views for those of legislative or executive officials on the wisdom of any government policy that can be characterized as a "search" or "seizure." *See Sitz*, 496 U.S. at 453-54 (choice among reasonable alternatives should be made by politically accountable officials, not by courts).

The Court has also recognized that multi-factor balancing tests are difficult to apply consistently and often generate confusion and needless litigation. *See Solorio v. United States*, 483 U.S. 435, 448-50 (1987); *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). Fourth Amendment reasonableness review is particularly subject to capricious application. Recently, for example, a panel of the Ninth Circuit conducted a detailed weighing of the facts and circumstances before concluding that a lawyer's Fourth Amendment rights were violated when his shoes set off a courthouse metal detector and he was compelled to remove them and walk through the detector in stocking feet. *Klarfeld v. United States*, 944 F.2d 583 (9th Cir. 1991), *reh'g en banc denied*, 962 F.2d 866 (9th Cir. 1992) (Kozinski, J. and ten other judges dissenting).

This Court's decision in *von Raab* has similarly been interpreted (and we think misinterpreted) to require any government entity seeking to implement a drug testing program for employees to defend every aspect of its program in fact-intensive litigation, with considerable variations in outcome depending inordinately upon the skill of the lawyers and identity of the judges assigned. The opinion below canvassed a number of these decisions and concluded that the government could require drug testing only to combat "extreme dangers and hazards" such as "an airplane or train wreck, or a gas pipeline or nuclear power plant disaster." *Acton v. Vernonia School District 47J*, 23 F.3d at 1514, 1526 (9th Cir. 1994).[2] As a consequence of this sort of judicial reasoning, public-sector drug testing has been discouraged in circumstances that do not happen to coincide factually with *Skinner* and *von Raab*. Perversely, it is much easier for drug users now to obtain jobs as teachers or government regulators than as employees of most major corporations in the private sector.

In summary, the characterization of this drug-testing program as a "search" should not necessarily suggest that it is disfavored or subject to intensive case-by-case judicial scrutiny. The Court should adopt a clear and categorical rule that drug testing programs of this nature are reasonable and thus constitutional.

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[2] By contrast, the Seventh Circuit has upheld a random drug testing program for jockeys and other horse race personnel where the government interest would seem considerably less critical, although no doubt legitimate. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (*en banc*).

II. Schools Have a Compelling Interest in Preventing Drug Use by Students in General, and by Athletes in Particular

The tragic consequences of adolescent drug use are apparent and should not require extended discussion.[3] Youthful bodies and minds are more vulnerable than those of adults to the adverse effects of drugs. Addiction is more likely to result when drug use begins at an early age. Drug use is strongly related to various kinds of risky behavior that can result in automobile collisions, other violent injuries, and sexually transmitted diseases (including the human immunodeficiency virus, which can also be transmitted through the sharing of hypodermic needles). Students must necessarily come into contact with a criminal element in order to obtain drugs and may themselves engage in drug dealing or other criminal activity to finance drug purchases. Drug-using students have inferior academic performance and are more likely to drop out of school. In short, it is hard to imagine a school district having a more compelling interest than the prevention of drug use among its students.

Drug use remains all too common among adolescents. Although substantial reductions in the prevalence of drug use occurred during the 1980's,[4] there is powerful evidence

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[3] *See generally*, Yifrah Kaminer, *Adolescent Substance Abuse*, *in* Textbook of Substance Abuse Treatment (Marc Galanter & Herbert D. Kleber, eds., 1994) (articles in this textbook are hereinafter cited to "Galanter & Kleber"), at 415-37 and references cited therein.

[4] The total number of current illegal drug users in the U.S. population declined from 24.3 million in 1979 to 11.4 million in 1992. (continued...)

of a recent reversal of this trend among young people. Annual surveys of a national sample of high school seniors have been conducted by the Institute for Social Research at the University of Michigan since 1975, with funding from the National Institute on Drug Abuse of the U.S. Department of Health and Human Services. Since 1991, this survey has also included a cross-section of eighth and tenth grade students.[5] The most recent results of this survey show a substantial increase in adolescent drug use over the past two years:

- The prevalence of past-year illicit drug use by high school seniors peaked at 54.2 percent in 1979, steadily declined until it bottomed out at 27.1 percent in 1992, and has rebounded since then to 35.8 percent in 1994. This is an increase of nearly one-third in only two years.[6]

- Even more disturbing is the trend among younger students. Use of marijuana among eighth graders more than doubled between 1991 and 1994, from 6.2 to 13.0 percent.

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[4] (...continued)
The White House, National Drug Control Strategy, *National Household Survey on Drug Abuse* (Feb. 1994), at 100.

[5] This survey was formerly known as the National High School Senior Survey, and is now called the Monitoring the Future Study. A copy of a synopsis of the study results, as released by the Department of Health and Human Services on December 12, 1994, is being lodged with the Clerk. Selected statistics from the survey are reproduced at Appendix A to this brief.

[6] A chart illustrating these trends is reproduced at Appendix B to this brief.

- Similar trends were observed for other drugs, including LSD, cocaine, and amphetamines.

In our view, the extent and serious harms of adolescent drug use would justify a school district's decision to require drug testing of all students. Certainly drug use is at least as harmful and prevalent as the communicable diseases that are the object of mandatory student vaccination programs. *Cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

In this case, the school district's testing program was limited to students participating in extracurricular athletics, in part because of concerns that a broader program might be struck down by the courts. Opp. Cert. at 16; *Acton v. Vernonia School District 47J*, 796 F. Supp. 1354, 1358 (district court opinion). This limitation in scope does not invalidate the school's general interest in preventing drug use among its students or require that the school justify its program solely with regard to some unique interest that pertains only to drug use by athletes. Governments can attempt to solve problems on a step-by-step basis, taking into account such factors as resource limitations, legal risk, and public acceptance. *Cf. Dandridge v. Williams*, 397 U.S. 471, 486 (1970).

With regard to athletes, however, the school district has a number of particular interests in preventing drug use. The health and fitness of students who participate in competitive athletics has traditionally been a matter of oversight by school authorities. Drug use can impair athletic performance and present unique risks to the health of young people who attempt to combine drug use with athletic exertion. For many drugs, levels of use among athletes appear to be similar to those of the student population as a whole. For other drugs, however, use

among athletes is more widespread because of their actual or perceived effect of enhancing athletic performance.[7]

The precise mix of risks sought to be prevented in a drug testing program for athletes will vary somewhat depending upon the drug being tested. Medical authorities document the following concerns about the drugs included in the school district's testing program in this case:

- Marijuana is the most prevalent illegal drug and often serves as a "gateway" to the use of other drugs. It is not ordinarily taken for the purpose of improving athletic performance, although a student could use it in an effort to calm the nerves before a competitive event. The adverse effects of marijuana on athletic performance include the impairment of concentration, psychomotor skills, time perception, and motivation.[8]

- Amphetamines are particularly dangerous to athletes because they are frequently taken to enhance performance by delaying or masking the symptoms of fatigue. However, their use can have a number of long and short term effects on

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[7] *See* Charles Feeney Knapp, Note, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 Iowa L. Rev. 107, 107 nn.3&4, 111-14 (1990), and authorities cited therein (hereinafter "Knapp").

[8] Peter Brukner & Karim Khan, *Clinical Sports Medicine* 681 (1993) (hereinafter "Brukner & Khan"); Jon C. Wagner, *Enhancement of Athletic Performance with Drugs*, *in* 12(4) Sports Medicine 250, 261 (1991) (hereinafter "Wagner"); Robert B. Millman & Ann Bordwine Breeder, *Cannabis*, *in* Galanter & Kleber, at 91-96.

health and fitness. Indeed, part of the impetus for drug testing of athletes came after the deaths of two cyclists in international competition were linked to amphetamine use.[9]

- Cocaine is also a stimulant that can be used to enhance athletic performance, although its effect is more transient than that of amphetamines. Cocaine use can also interfere with athletic performance by impairing eye-hand coordination, sense of time, and inducing inappropriate behavior. The harmful health effects of cocaine are extensive, and its use has been linked to the deaths of a number of well-known athletes.[10]

- LSD has numerous serious adverse effects that would certainly create a serious impairment of athletic performance.[11]

In addition to the particular drugs included in the Vernonia School District program, other drugs can and often are included in testing programs for athletes. Their harmful effects are also documented in the medical literature:

- Anabolic and androgenic steroids are often taken by student athletes to increase muscle mass and

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[9] Brukner & Khan at 672-74; Wagner at 251, 255-56. *See also* Frank H. Gawin, et al., *Stimulants*, *in* Galanter & Kleber, at 111-22.

[10] Brukner & Khan at 674-75; Wagner at 256-57.

[11] J. Thomas Ilngerleider & Robert N. Pechnick, *Hallucinogens*, *in* Galanter & Kleber, at 141-47.

strength. Steroid use is particularly common among weight-lifters and football players. One study found that 6.6 percent of male high school seniors had abused steroids, most of whom participated in sports. The same study found that 20 percent of college athletes abused steroids.[12] Numerous studies have concluded that steroid use can pose serious long-term health risks, although many young athletes are willing to ignore such risks because of competitive pressures and their inability to comprehend long-term consequences. Steroid use can also cause psychological effects such as increased aggressiveness, delusions, schizophrenia and thoughts of suicide.[13] Use of injectable steroids can lead to transmission of the human immunodeficiency virus as a result of needle sharing.[14]

- Alcohol does not enhance athletic performance, although some athletes may believe its use can reduce anxiety before competition or that it provides a good source of carbohydrates in their diet. Alcohol can harm performance by impairing

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[12] U.S. General Accounting Office, *Drug Misuse: Anabolic Steroids and Human Growth Hormone* (August 1989) at 14-17.

[13] *See* Wagner at 257-59; John S. Hallagan, et al., *Anabolic-Androgenic Steroid Use by Athletes*, 321 N. Eng. J. Med. 1042 (1989); Harrison G. Pope & David L. Katz, *Psychiatric and Medical Effects of Anabolic Androgenic Steroid Use*, 51 Arch. Gen. Psych. 375 (1994). *See also*, Knapp, *supra* note 7, at 111-14.

[14] Zili Amsel, et al., *Anabolic Steroid Use Among Male High School Seniors*, 261 J. Am. Med. Ass'n. 2639 (May 12, 1989).

balance, coordination, reaction time and mental functions.[15] The long term health effects of alcohol abuse are well known.

No constitutional objection should be based upon the fact that the Vernonia drug testing program was limited to four substances and did not include steroids or alcohol.[16] As noted above, public authorities are allowed to solve problems on a step-by-step basis. Government action is not unreasonable because it fails to address all other problems that could be described as equally serious. If, as we have contended, the school district could constitutionally require athletes to take drug tests, then the courts should not further burden the adoption of such programs by requiring litigation over the wisdom of each drug that is included or excluded from the testing list. This is the sort of issue that should be addressed by the policymakers responsible for the school district and its athletic program. *See Sitz*, 496 U.S. at 453-54.

However, to the extent justification is required, it should be noted that steroid testing is more complex and expensive than testing for street drugs. Urinalysis testing for drugs such a marijuana and cocaine is quite common

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[15] Wagner at 260.

[16] A district court in the Ninth Circuit had no difficulty in concluding that the court of appeals decision in this case required it to hold unconstitutional a high school athletic drug testing program that did include alcohol and steroids. *Moule v. Paradise Valley Unified School District No. 69*, 863 F. Supp. 1098, 1100, 1103 (D. Ariz. 1994).

and relatively inexpensive.[17] To the extent that an athletic testing program does not include alcohol, it may be because it is not perceived to be as harmful as other drugs or because its current use is readily detected by the odor of alcohol on the breath. Alcohol is also more rapidly metabolized than many other drugs, and thus testing is likely to detect only very recent use.[18]

III. Students Participating In Extracurricular Athletics Have a Reduced Expectation of Privacy

Drug testing programs intrude upon privacy in two ways. First, the collection of urine specimens can involve some compromise of personal modesty, which may vary depending upon the collection protocol. To some extent, the act of urination must be observed or monitored in order to prevent substitution or tampering with a specimen.[19] In this regard, there may be a trade-off between privacy and the effectiveness of testing. The second sense in which drug testing invades privacy is its potential to uncover information about the subject's ingestion of drugs. Of

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[17] *See* Asbjorg Salberg Christopher & Jorg Morland, *Drug Analysis for Control Purposes in Forensic Toxicology, Workplace Testing, Sports Medicine and Related Areas*, 74 J. Pharm. & Toxicol. 202 (1994); Eric Wish & Bernard A. Gropper, *Drug Testing by the Criminal Justice System: Methods, Research, and Applications*, *in* Drugs and Crime 321 (Michael Tonry & James Q. Wilson, eds., 1990) (hereinafter "Wish & Gropper").

[18] *See* Wish & Gropper at 348 (listing duration of detectability for various drugs).

[19] *Id.* at 376.

course, there is little social value in protecting information about the use of illegal or prohibited drugs.[20]

Courts have weighed the seriousness of these intrusions in a variety of ways, and to some extent judges' reactions have seemed idiosyncratic and perhaps exaggerated. Unlike many other kinds of searches, drug tests are very specific in uncovering the particular illegal or prohibited conduct at which they are targeted. Unlike searches of briefcases or offices, they are unlikely to disclose other information that the subject has a legitimate interest in keeping private. Drug testing is also quite common in the private sector, primarily as a condition of employment.[21]

However the courts may view the intrusiveness of drug testing in other contexts, there are good reasons for recognizing that it has a reduced impact on the reasonable

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[20] Some drugs can be used legally pursuant to a doctor's prescription, and thus testing programs may require disclosure of confidential medical information to explain a positive test result. This privacy interest is minimized in the athletic context, where the subject's health and fitness is a legitimate subject of concern. In other contexts, testing programs generally have procedures in place to protect the confidentiality of private medical information that may be provided. *See Skinner* 789 U.S. at 626 n.7; *von Raab*, 489 U.S. at 662 n.1.

[21] The American Management Association has conducted an annual survey of workplace drug testing policies of major corporations since 1987. The survey has shown a steady increase of corporations that have drug testing programs, from 20 percent in 1987 to 87.2 percent in 1994. Perhaps not coincidentally, the percentage of employees and applicants who test positive has also declined steadily over this period. *See* 8 National Report on Substance Abuse, no. 10, at 1 (Apr. 22, 1994).

privacy expectations of members of athletic teams. Athletes have traditionally been subject to a variety of training rules that do not apply to other students, including curfews, mandatory practice sessions, dietary restrictions, and prohibitions of the use of tobacco or alcohol. Perhaps it could be said that an athlete is "seized" when required to attend practice, or "searched" when the coach performs a bed check on an out-of-town trip, but these are routine and accepted practices that would not seem unreasonable under the Fourth Amendment.

The Court can certainly take judicial notice of the fact that athletic locker rooms rarely afford much privacy for showering, changing clothes or restroom use. Athletes' bodies are subject to examination and touching by coaches, trainers, and team doctors. In particular, it is common for students to be required to undergo medical and fitness examinations as a condition of being allowed to participate in sports.[22]

The preparticipation sports examination can certainly be intrusive, requiring the subject to undress in the presence of medical personnel who may or may not be of the same sex. The examination itself may be far more invasive than a requirement to produce a urine specimen. For example, a standard protocol includes manual

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[22] Council on Scientific Affairs, American Medical Association *Ensuring the Health of the Adolescent Athlete*, 2 Arch. Fam. Med. 446 (Apr. 1993). The Council recommended that the preparticipation athletic examination routinely include an assessment of the use of steroids and other drugs, although it did not specifically recommend urinalysis drug testing. *Id.*

examination of the male genitalia to determine the presence of a hernia or undescended testicle.[23]

It should also be noted that urinalysis is often included in the screening examination, which one authority described as a "simple and . . . valuable screening tool to determine the presence of glucose, protein or blood in the urine."[24] Certainly if a student can reasonably be required to provide a urine specimen to test for glucose, protein, or blood, it would not seem unreasonable to test the urine specimen for amphetamines, steroids or other drugs that can pose equal or greater threats to the athlete's health and fitness.

It should also be noted that drug testing is widely practiced in college, amateur and professional sports. The National Collegiate Athletic Association (NCAA) prohibits the use of a variety of drugs by college students participating in intercollegiate athletics and enforces these prohibitions through drug testing.[25] A number of colleges have adopted their own drug testing programs.[26] Although less common at the high school level because of legal and

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[23] John A. Lombardo & John W. Toga, *Preparticipation Screening and Performance Assessment*, *in* Clinical Sports Medicine (William A. Urn & Alexander Kalonak, eds., 1991) at 81-82.

[24] Brukner & Khan at 647.

[25] The California Supreme Court recently rejected a state constitutional challenge to the NCAA testing program at a private university after conducting an analysis based on Fourth Amendment precedents. *Hill v. National Collegiate Athletic Association*, 865 P.2d 633, 657-65 (Cal. 1994).

[26] Knapp, *supra* note 7, at 116-18.

financial issues,[27] the widespread acceptance of this practice in other levels of competition has a bearing on its reasonableness for high school athletes.

IV. Administrative Features of the Drug Testing Program Further Support Its Reasonableness

The drug testing program in this case can readily be characterized as an administrative search. The students are required to consent to testing as a condition of participating in extracurricular athletics. The tests are administered uniformly at the beginning of the season and on a random basis thereafter. The result of a positive test is referral for treatment and/or suspension of participation in athletics. These aspects of the program provide further safeguards and indicia of reasonableness.

Consent, whether implied or actual, has often been viewed as a factor supporting the constitutionality of a search. To be sure, it is often said that the government cannot require citizens to "waive" their constitutional rights in order to receive a government benefit. Yet, whatever may be the utility of the unconstitutional conditions doctrine in other contexts,[28] the Court should recognize that extracurricular athletics are a voluntary activity and there is a reasonable nexus between athletic fitness and drug

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[27] *Id.* at 115-16.

[28] *See* Cass Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism*, 70 B.U.L. Rev. 593 (1990). For a political process analysis of drug testing and the Fourth Amendment, *see* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 Stan. L. Rev. 553, 585-89 (1992).

testing. *Cf. Wyman v. James*, 400 U.S. 309 (1971) (reasonable to require home visit by caseworker as a condition for receiving benefits under Aid to Families with Dependent Children program).

The absence of discretion in administering the program is also a factor that has sustained the reasonableness of administrative searches, including the drug testing programs that have been upheld by this Court. *Skinner*, 489 U.S. at 622 & n.6; *von Raab*, 489 U.S. at 667; *Sitz*, 496 U.S. at 453-54. In this case there is no room for arbitrary or discriminatory selection of students for testing, and for that reason there is no reason for a student to feel any stigma about being selected for testing.

Finally, there is no reason to believe that the testing program is an effort to evade the normal constitutional safeguards that apply to criminal law enforcement. The sanctions applied to those who test positive are administrative, not criminal, and are designed to treat and prevent drug abuse rather than to punish.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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APPENDIX A

Percentage of Students Reporting Drug Use in Previous Year:*

	1991	1992	1993	1994
Any Illicit Drug				
8th grade	11.3	12.9	15.1	18.6
10th grade	21.4	20.4	24.7	30.0
12th grade	29.4	27.1	31.0	35.8
Marijuana				
8th grade	6.2	7.2	9.2	13.0
10th grade	16.5	15.2	19.2	25.2
12th grade	23.9	21.9	26.0	30.7
LSD				
8th grade	1.7	2.1	2.3	2.4
10th grade	3.7	4.0	4.2	5.2
12th grade	5.2	5.6	6.8	6.9
Cocaine				
8th grade	1.1	1.5	1.7	2.1
10th grade	2.2	1.9	2.1	2.8
12th grade	3.5	3.1	3.3	3.6
Stimulants (i.e., amphetamines)				
8th grade	6.2	6.5	7.2	7.9
10th grade	8.2	8.2	9.6	10.2
12th grade	8.2	7.1	8.4	9.4

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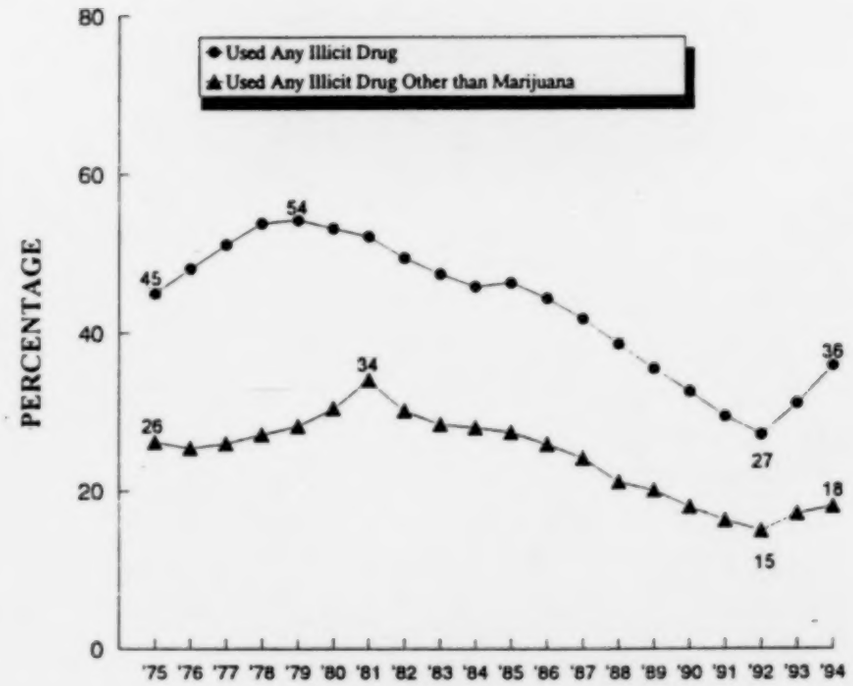
* U.S. Dep't. of Health and Human Services, *Monitoring the Future Study* (Dec. 12, 1994).

APPENDIX B

Trends In An Annual Index of Illicit Drug Use By Twelfth Graders:*



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* U.S. Dep't. of Health and Human Services, *Monitoring the Future Study* (Dec. 12, 1994) (figure 1). "Use of 'any illicit drugs' includes any use of marijuana, hallucinogens, cocaine, and heroin, or any use which is not under a doctor's orders of other opiates, barbituates, methaqualone (excluded since 1990), or tranquilizers." *Id.*

"Beginning in 1982 the question about stimulant use (i.e., amphetamines) was revised to get respondents to exclude the inappropriate reporting of non-prescription stimulants. The prevalence rate dropped slightly as a result of this methodological change." *Id.*